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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMON CAUSE, ET AL.,
Appellants,
v.
HARRISON SCHMITT, ET AL.,
Appellees.

On Appeal From the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

Of Counsel:

KENNETH J. GUIDO, JR.
ELLEN G. BLOCK
DONALD J. SIMON
COMMON CAUSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1200

LOUIS R. COHEN
MICHAEL L. BURACK *
ROGER M. WITTEN
CLIFFORD B. HENDLER
WILMER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Attorneys for Appellants

* *Counsel of Record*

November 25, 1980

QUESTION PRESENTED

Under the Presidential Election Campaign Fund Act, 26 U.S.C. ch. 95, a candidate for President may opt to finance his campaign through a public grant, instead of through private fundraising. Where a Presidential candidate receives public financing, political committees that solicit and spend contributions but are not part of the candidate's official campaign may not, under Section 9012(f) of the Act, 26 U.S.C. § 9012(f), spend more than $1,000 to further his election. Section 9012(f) does allow individuals and groups of individuals to make unlimited independent expenditures of their own money in those circumstances.

The ultimate question presented is whether the district court erred in holding 26 U.S.C. § 9012(f) unconstitutional under the First Amendment.

The threshold question presented is whether this Court should summarily reverse the decision below and remand the case to the district court with directions to develop a factual record adequate to serve as the basis for constitutional adjudication.*

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* In addition to the parties named in the caption, the other parties to the proceeding below were David Cohen, Winifred Long, Carl T. Curtis, Americans for Change, Americans For An Effective Presidency, Fund For A Conservative Majority, and the Federal Election Commission. The alignment of the parties is set forth at page 2 *infra*.

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JURISDICTIONAL STATEMENT

Appellants Common Cause, David Cohen and Winifred Long (plaintiffs below) appeal from the orders entered by the United States District Court for the District of Columbia on August 28, 1980 and September 30, 1980 that granted summary judgment for appellees (defendants below) and dismissed appellants' action on the ground that 26 U.S.C. § 9012(f) violates the First Amendment of the Constitution of the United States.

OPINION BELOW

The September 30, 1980 opinion of the district court, which is not yet officially reported, appears as Appendix A to this Jurisdictional Statement.[1]

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[1] Citations to pages of the Appendices to this Jurisdictional Statement are given as "App. ——."

Appendix I (App. 69a) is the Amended Complaint, without Exhibits, filed in Civil Action No. 80-1609. The Exhibits could not

JURISDICTION

The proceeding below consisted of two civil actions, which were consolidated by order filed September 25, 1980 (Appendix F, App. 37a). Civil Action No. 80-1609 was brought, under 26 U.S.C. § 9011(b), by appellants against appellees Harrison Schmitt, Carl T. Curtis, Americans For Change ("AFC"), Americans For An Effective Presidency ("AEP"), and Fund For A Conservative Majority ("FCM"). Civil Action No. 80-1754 was brought, under 26 U.S.C. §§ 9011(b) and 9010(c), by the Federal Election Commission ("the Commission") against appellees AFC, AEP and FCM.

The actions were heard and decided together by a three-judge district court, pursuant to 26 U.S.C. § 9011 (b)(2). On August 28, 1980 the court entered orders granting appellees' motions for summary judgment and dismissing both actions (Appendices B and C, App. 31a, 33a). On September 30, 1980 the court issued an opinion and entered a further order disposing of the cases consistently with its earlier orders (App. 1a, 30a).[2] No rehearing was requested.

Appellants filed timely notices of appeal on September 26, 1980 (Appendices D and E, App. 35a, 36a) and a timely amended notice on October 3, 1980 (Appendix G, App. 39a). The Court has jurisdiction over this appeal under 26 U.S.C. § 9011(b)(2) and 28 U.S.C. §§ 1252 and 1253.

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practicably be reproduced in the main volume of Appendices. They have, accordingly, been lodged with the Court under separate cover. Citations to pages in that volume are given as "App. (Supp.) ——."

[2] The district court did not enter a separately designated judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution of the United States provides, in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ."

26 U.S.C. § 9012(f) provides, in relevant part:

> ". . . [I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1000."

Appendix H sets forth (1) the Presidential Election Campaign Fund Act, of which 26 U.S.C. § 9012(f) is a part (App. 41a-66a), and (2) related provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 441a(b) and 441a(c) (App. 66a-68a).

STATEMENT OF THE CASE

A. The Statutory Scheme.

In 1971 Congress enacted the Presidential Election Campaign Fund Act, 26 U.S.C. ch. 95 ("Fund Act"), which provides for public financing, as an optional alternative to private fundraising, in Presidential general election campaigns. Public financing under the Fund Act became available for the first time in the 1976 general election. *See* 26 U.S.C. § 9013.

In order to be eligible for public financing, candidates for President and Vice President must agree that they

and their "authorized committees" [3] will abide by restrictions on contributions and on the amount of "qualified campaign expenses" they incur.[4] *See* 26 U.S.C. §§ 9002(4), 9003. In particular, the candidates of a major party must certify to the Commission that they and their authorized committees (1) will not incur aggregate qualified campaign expenses in excess of the public payment and (2) will not accept contributions to defray campaign expenses. 26 U.S.C. § 9003(b). Upon receiving public financing, major-party candidates and their authorized committees must live up to their certifications, by limiting their total campaign expenses to the amount of the public grant—$29,440,000 for the 1980 general election [5]—and not accepting contributions. 26 U.S.C. §§ 9012(a)(1), (b)(1).

26 U.S.C. § 9012(f), the section at issue in this appeal, complements those provisions by regulating political committees that are not "authorized committees" of candidates for President and Vice President—*i.e.*, political

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[3] The Fund Act defines a "political committee" as

> "any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office." 26 U.S.C. § 9002(9).

A political committee is an "authorized committee" of candidates for President and Vice President if it is "authorized in writing by such candidates to incur expenses to further the election of such candidates." 26 U.S.C. § 9002(1).

[4] "Qualified campaign expenses" include all campaign-related expenses incurred by the candidates, by their authorized committees or by any person authorized by the candidates or one of their authorized committees. 26 U.S.C. § 9002(11).

[5] *See* 26 U.S.C. § 9004(a); 2 U.S.C. §§ 441a(b)(1)(B), 441a(c).

committees that are not part of the candidates' official campaign organization. Section 9012(f) prohibits such political committees from spending more than $1,000 to further the election of Presidential and Vice Presidential candidates who have chosen to finance their campaign through a Fund Act grant, instead of through private fundraising. By its terms, Section 9012(f) does not limit expenditures by individuals or by groups of individuals that do not constitute "political committees" within the meaning of the Fund Act.

B. The Facts That Gave Rise To These Cases.

Ronald Reagan, the Republican Party candidate for President in the 1980 general election, opted to finance his campaign through a public financing grant under the Fund Act. Consequently, the Reagan campaign[6] was prohibited from accepting private campaign contributions and from spending more than the amount of the public grant, and political committees that were not part of the official Reagan campaign were prohibited by 26 U.S.C. § 9012(f) from spending more than $1,000 to further Mr. Reagan's election.

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[6] We use the terms "the Reagan campaign" and "the official Reagan campaign" to refer to Ronald Reagan, his authorized committees and their agents. His authorized committees included the Reagan For President Committee, the Reagan For President General Election Committee, the Reagan For President Compliance Fund and the 1980 Republican Presidential Unity Committee. (*See* Statement of Candidacy of Ronald Reagan, filed with the Federal Election Commission and dated June 26, 1980.) The Republican National Committee was also an authorized committee and agent of the Reagan campaign. (*See* Exhibit A to Affidavit of William E. Brock, III, filed July 24, 1980, on behalf of the Reagan For President General Election Committee and Ronald Reagan in *Carter-Mondale Reelection Committee* v. *Federal Election Commission*, No. 80-1842 (D.C. Cir.).)

Appellees AFC, AEP and FCM are "political committees" within the meaning of the Fund Act. App. 74a, 75a, 77a. Each of them mounted a nationwide fundraising and media campaign in support of Ronald Reagan's candidacy. Their campaigns purported to be independent of the official Reagan campaign.[7] Appellees announced that they intended to raise and spend, in the aggregate, between $26,000,000 and $48,000,000.[8] Because AFC, AEP and FCM were not "authorized committees" of Ronald Reagan, that money came within the scope of 26 U.S.C. § 9012(f).

Appellees AFC, AEP and FCM raised their money primarily through computerized mass mailings. App. 77a-79a. Solicitation materials were sent to thousands of individuals whose names appeared on mailing lists that appellees purchased, rented or otherwise obtained. *See* App. (Supp.) 4b-7b, 38b-48b. Contributors to the appellee committees sent money in response to these form letters.

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[7] As discussed at pages 7-9 *infra*, appellants had alleged, in Count II of their Amended Complaint, that appellees were not in fact independent of the official Reagan campaign. App. 81a-82a. Appellants have renewed that allegation in a still-pending administrative complaint filed with the Commission pursuant to 2 U.S.C. § 437g, and are not appealing the district court's dismissal of Count II. Thus, for purposes of this appeal, we assume *arguendo* that AFC, AEP and FCM operated independently of the official Reagan campaign.

[8] App. 71a. AFC announced that, "on behalf of Ronald Reagan," it sought to raise and spend between $20,000,000 and $30,000,000. App. (Supp.) 7b; App. 77a. AEP announced that it sought to raise and spend between $3,000,000 and $8,000,000. App. 78a. FMC announced that it sought to raise and spend between $3,000,000 and $10,000,000. App. 79a.

The contributors had no control over the committees' operations or their spending decisions.[9]

The operations of each appellee committee were run, and the expenditure decisions made, by a small nucleus of professional political managers. App. 77a, 78a, 79a; App. (Supp.) 6b, 17b-18b. Some of the organizers and operators of appellee committees had been involved in running past Republican Party presidential campaigns. App. 76a-77a. Appellees had various interlocking relationships with authorized committees of Ronald Reagan during the 1980 campaign. AFC shared personnel with the Republican National Committee, the 1980 Republican Presidential Unity Committee and the Reagan For President Committee, App. 74a-75a, and took part in the 1980 Republican National Convention. App. 78a; App. (Supp.) 11b. AEP had interlocks with the Republican National Committee and the Reagan For President Committee.

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[9] Although AFC invited contributors to send in their "thoughts and suggestions," AFC told the contributors that "[t]he decisions on expenditures must be controlled by the Committee." App. (Supp.) 6b. FCM just asked for money, and did not invite contributors to send in their views on expenditure decisions. App. (Supp.) 38b-48b. As for AEP, its initial release had sought to create the appearance that there would be contributor participation. According to that release, every contributor would automatically become a "Member" of AEP, and virtually every "Member" could automatically be deemed a "Participating Member." App. (Supp.) 16b. "Participating Members" were to be "periodically polled and invited to periodic meetings to consider policy questions before the organization." App. (Supp.) 17b. But AEP never even stated—let alone presented evidence—that there had in fact been such polls of or invitations to contributors, or that such polls or meetings (if any) in fact determined AEP policy.

The record thus contained no evidence that the contributors to the appellee committees actually exercised any control over the committees' activities. Whether they did is, of course, a question of fact. Appellants sought to inquire into this matter through discovery, but the district court denied all of appellants' discovery requests. *See* pp. 9-10 *infra*.

App. 76a. FCM shared common campaign consultants and vendors with the Reagan campaign.[10]

At least two of the appellee committees operated under names designed to foster the impression that they were part of the Reagan campaign. AFC operated under the name "Reagan For President in '80." App. 77a; App. (Supp.) 4b, 6b, 7b. FCM operated under the name "Citizens For Reagan in '80." App. 79a; App. (Supp.) 38b-48b.[11] Appellees' literature suggested that their purpose was to allow the Reagan campaign indirectly to evade the prohibitions against private fundraising and excess expenditures that apply to publicly financed candidates. Thus, appellees encouraged contributors to give to them the money that could not be given to Ronald Reagan directly, so that they could spend on his behalf more than his campaign could spend directly. App. (Supp.) 3b-4b, 42b-43b.[12]

C. The Proceedings Below.

On July 1, 1980, appellants filed a Complaint against AFC and its Chairman and Treasurer (Civil Action No. 80-1609). Count I alleged that AFC's activities, whether or not independent of the official Reagan campaign, violated 26 U.S.C. § 9012(f). Count II alleged that AFC was not in fact independent of the official Reagan campaign and that AFC's receipts and expenditures were therefore chargeable to the official Reagan campaign, resulting in violations of the Fund Act's restrictions on

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[10] *See* Plaintiffs' Opening Brief on the Merits (pp. 17-18), filed by appellants in Civil Action No. 80-1609 on August 4, 1980.

[11] Appellees' use of these names violated the spirit, if not the letter, of 2 U.S.C. § 432(e)(4), which prohibits political committees that are not authorized committees of a candidate from using the candidate's name in their titles.

[12] *See also* Plaintiffs' Opening Brief on the Merits (p. 16), filed by appellants in Civil Action No. 80-1609 on August 4, 1980.

private fundraising and excess expenditures. The Complaint sought declaratory and injunctive relief. Appellants requested that a three-judge district court be convened, and the action expedited, pursuant to 26 U.S.C. § 9011(b). Appellants sought discovery and moved for leave to commence the discovery immediately.

On July 15, 1980, the Commission filed an action against appellees AFC, AEP and FCM (Civil Action No. 80-1754). The Commission contended that appellees' activities, whether or not independent of the Reagan campaign, violated 26 U.S.C. § 9012(f). The Commission sought declaratory relief, including a declaration that Section 9012(f) is constitutional.

On July 17, 1980, appellants filed an Amended Complaint that added appellees AEP and FCM as defendants (Appendix I, App. 69a-84a). As a result, the Commission's action and Count I of appellants' Amended Complaint were essentially identical. Appellants moved to consolidate the two actions and also to intervene as plaintiffs in the Commission's action.

Appellees moved for summary judgment and dismissal in both actions. AFC argued that the prohibition in 26 U.S.C. § 9012(f) did not apply to political committees whose activities were independent of a publicly financed candidate's official campaign, and all of the appellees argued that Section 9012(f) was unconstitutional as applied to such committees. Appellees also moved to dismiss appellants' action (No. 80-1609) on jurisdictional grounds and to stay the discovery that appellants had sought. On July 21, 1980 the Commission also moved to dismiss appellants' action on jurisdiction grounds.[13]

[13] The Commission had earlier, on July 11, 1980, sought leave to intervene as a defendant in appellants' action for the limited purpose of moving to dismiss on the ground that appellants' action, as it then stood, impinged upon the Commission's primary jurisdiction over the enforcement of the Federal election laws, notwithstanding the plain language of 26 U.S.C. § 9011(b).

A three-judge district court was designated on July 16, 1980. The court stayed all discovery and set briefing and argument schedules on the jurisdictional issues and on the merits. Briefing and argument were held, and the court's opinion rendered, without any factual development having taken place.[14]

On August 28, 1980, the district court issued orders dismissing both actions. In the Commission's action, which was grounded on 26 U.S.C. § 9012(f), the court granted appellees' motions for summary judgment on the merits. App. 33a. In appellants' action the court dismissed Count I, which also was grounded on Section 9012(f), on the basis of its disposition of the Commission's case. App. 31a. The court dismissed Count II of appellants' Amended Complaint for lack of jurisdiction and failure to state a claim.[15] *Id.*

On September 25, 1980, the Court issued an order formally consolidating the two cases. App. 37a. On September 30, 1980, the Court issued its opinion (Appendix A, App. 1a).

D. The District Court's Opinion.

At the outset the district court rejected AFC's statutory argument that 26 U.S.C. § 9012(f) does not reach expenditures by political committees that operate inde-

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[14] Thus, the record before the district court consisted essentially of (1) the allegations in, and the exhibits to, appellants' Amended Complaint, (2) the allegations in the Commission's Complaint, (3) additional factual allegations (together with supporting citations) set forth in appellants' Opening Brief on the Merits, filed August 4, 1980, and (4) the documentation submitted by the Commission on August 4, 1980 in support of its motion for summary judgment. In addition, AFC submitted a conclusory affidavit of its Chairman, Harrison Schmitt, on August 4, 1980, but the district court denied appellants' request for discovery into the assertions made in the affidavit.

[15] Appellants are not appealing from the district court's dismissal of Count II. *See* note 7 *supra*.

pendently of a publicly financed candidate's official campaign organization. App. 5a-7a. The district court then proceeded to consider whether Section 9012(f), as applied to such political committees, was constitutional.

The district court's analysis rested upon its reading of this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), App. 8a-14a, and in particular upon its interpretation of the distinction between contributions and expenditures, App. 11a-14a. Applying its interpretation to what it assumed to be the facts of the case, the district court concluded that this "is an 'expenditure' case because it is precisely the speech of individual contributors which is hampered by the statutory restriction." App. 15a.

The district court's application of the contribution-expenditure distinction was premised upon several factual findings. The court stated that "speech promulgated through a political committee bears a different relation to its constituent contributors than does a candidate's speech to his or her constituent supporters (or, contributors to the non-publicly funded candidate)." App. 17a. In this connection, the district court also found that "[t]he organizers of independent political committees, as agents and unlike candidates, are tied by their commitments to their particular contributors," App. 18a, and that "[t]he contributors do have power over the speech disseminated by the political committees." App. 16a.

The district court concluded that 26 U.S.C. § 9012(f) does not serve a sufficiently compelling governmental interest to outweigh the burden that (in the court's view) it imposes on speech. App. 19a-21a. According to the court, the fact that a political committee operates independently of a candidate's official campaign organization suffices to eliminate any danger that the candidate, if elected, will be beholden to the committee. App. 19a. Beyond that, the court perceived no danger that individual contributors could, through their contributions to a politi-

cal committee, compromise the candidate. App. 19a-20a. The court thus concluded that Section 9012(f) does not serve a compelling governmental interest.

In weighing the burden on speech, the district court accorded no constitutional significance to the fact that Section 9012(f), while regulating political committees, leaves individuals and groups of individuals free to spend as much of their own money as they wish to express their views. App. 21a-22a. The court found political committees that spend other people's money to be constitutionally indistinguishable from individuals who spend their own money for their own speech. App. 22a. In addition, the court concluded that Section 9012(f) violates the associational rights of contributors to a political committee. App. 22a-24a.

On the basis of its analysis, the district court held 26 U.S.C. § 9012(f) unconstitutional under the First Amendment. The district court granted summary judgment for appellees AFC, AEP and FCM in the Commission's action (No. 80-1754). App. 30a. Stating that Count I of appellants' action (No. 80-1609) "involves the same issue as in the action brought by the FEC, herein resolved against the FEC," the district court dismissed Count I of appellants' action "as mooted pursuant to our decision in the FEC action." App. 25a. *See also* App. 30a.

ARGUMENT

The district court, acting on the bare pleadings and without allowing any factual development, struck down an Act of Congress as unconstitutional. The district court erred in doing so. Constitutional adjudication cannot be undertaken in a vacuum, on the basis of unsupported assumptions; it requires a record that fairly illuminates the activities and subjects at issue. Accordingly, the most appropriate course for this Court is summarily to reverse the district court's decision and remand the case for the development of an adequate factual record. If this Court declines to do so, it should certainly insist upon full briefing and argument before deciding this difficult and important case.

I. THE COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW AND REMAND THE CASE FOR FACTUAL DEVELOPMENT.

This case, as it presently stands, is ill suited to constitutional adjudication. There is virtually no factual record beyond the pleadings, because appellees opposed, and the district court disallowed, all discovery. The factual findings that formed the major premises of the district court's decision were thus made in a vacuum and, not surprisingly, were totally unsupported.

The district court should not have ruled on the constitutionality of 26 U.S.C. § 9012(f) in the absence of "the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." *United States* v. *Automobile Workers*, 352 U.S. 567, 591 (1957). *See also Askew* v. *Hargrave*, 401 U.S. 476, 478-79 (1971) (per curiam); *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111, 113 (1962) (per curiam) (referring to the need for an "adequate and full-bodied record"). The necessary factual inquiries

were relatively limited, and an ample record could have been—and still can be—developed quickly and efficiently.[16] In both *Buckley* v. *Valeo*, *supra*, and *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge district court), *aff'd*, 445 U.S. 955 (1980), the constitutionality of Fund Act provisions was adjudicated on the basis of detailed factual findings supported by evidentiary records that fairly illuminated the activities and subjects involved. *See* 424 U.S. at 9-10; 487 F. Supp. at 290-307. By not compiling such a record in this case before ruling on the constitutionality of Section 9012(f), the district court fell into the error of deciding an important constitutional issue in the abstract—an error that this Court can and should avoid.[17]

The district court's decision demonstrates exactly why constitutional issues should not be decided in a vacuum.

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[16] Much of the discovery originally sought by appellants related only to the issue, raised in Count II of the Amended Complaint, whether the appellee committees were in fact independent of the official Reagan campaign. That issue, however, is not on appeal here, *see* note 7 *supra*, and would therefore not be before the district court in the event of a remand.

Appellants also sought discovery bearing upon the issue, involved in Count I, whether 26 U.S.C. § 9012(f) is constitutional. That discovery, though relatively limited in scope, was of critical importance. It would have illuminated the relationship between contributors to the appellee committees and the handful of political operators who actually controlled the committees. *See* note 9 *supra*. It would also have provided a factual basis for determining whether the activities of political committees such as appellees pose the kinds of dangers of actual or apparent *quid pro quo*'s that this Court recognized in *Buckley*. *See* 424 U.S. at 26-27.

[17] In the absence of an evidentiary record, the district court should have resolved all factual uncertainties in favor of appellants, since appellants' case was before the court on motions by appellees to dismiss and for summary judgment. The district court's failure to do so was clear error. *See, e.g., Conley* v. *Gibson*, 355 U.S. 41 (1957); *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962) (per curiam).

One of the court's principal errors was to base its analysis upon factual findings that lacked any support in the record—findings concerning, among other things, the relationship between appellee committees and their contributors, and the potential for corruption (or the appearance of corruption) posed by the committees' activities. *See* pp. 11-12 *infra*. The record simply does not contain the facts needed to illuminate these points, which are critical to a proper resolution of the constitutional issues.

For these reasons, the best course by far is for this Court to reverse the decision below and remand the case for factual development. This is what the Court has previously done when, in the exercise of its appellate jurisdiction, it was faced with a record inadequate for constitutional adjudication. *United States* v. *Automobile Workers*, *supra*.[18] Such a remand will, of course, delay the ultimate decision by this Court. But there is no need for haste, now that the election is past. So long as the validity of 26 U.S.C. § 9012(f) is decided by this Court before the next Presidential general election campaign, the decision will be timely. The Court can and should

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[18] The *Automobile Workers* case is solid precedent for a reversal and remand in this case. *Automobile Workers* was a direct appeal from the district court. The appeal involved the constitutionality of former 18 U.S.C. § 610, which prohibited (among other things) expenditures by labor unions to further the election of candidates for federal office. The case had arisen from the district court's dismissal of an indictment, and as a result there was no factual record beyond the pleadings. This Court was confronted with a challenge to the facial constitutionality of the statute, and both parties were apparently pressing for a decision on the issue. *See* 352 U.S. at 591-92. Nevertheless, this Court reversed and remanded the case to the district court in order to provide "the concrete factual setting . . . especially demanded for constitutional decision." *Id.* at 591.

The procedure followed in *Automobile Workers* is well established. *See, e.g., Polk Co.* v. *Glover*, 305 U.S. 5, 10 (1938) (per curiam) (reversing and remanding to three-judge district court for factual development); *Borden's Co.* v. *Baldwin*, 293 U.S. 194, 208-13 (1934) (same).

proceed deliberately to ensure that this case is decided on the basis of an adequate record.

II. IN ANY EVENT, THE COURT SHOULD NOT DECIDE THIS DIFFICULT AND IMPORTANT CASE WITHOUT FULL BRIEFING AND ARGUMENT.

If the Court does not reverse the decision below and remand for the development of a factual record, then the Court should definitely give this case plenary consideration. The statute that the district court invalidated is too important, and the constitutional issues involved are too substantial, to allow the merits to be decided without full briefing and argument.

A. The Provision That The Court Below Invalidated Is An Important Part Of The Statutory Scheme For The Public Financing Of Presidential General Elections.

The purpose served by the Fund Act is important in the extreme, because it directly affects the integrity of, and the perception of integrity surrounding, the office of President of the United States. *See Burroughs* v. *United States*, 290 U.S. 534, 545 (1934). The financing of Presidential campaigns through private fundraising creates a danger of "political *quid pro quo*[s]" that can compromise candidates, as well as a danger that candidates will appear to have been compromised. *Buckley* v. *Valeo*, 424 U.S. at 26-27. Congress enacted the Fund Act to eliminate those dangers.

The Fund Act enables Presidential candidates to finance their campaigns in a manner that does not create "implicit obligations" to private benefactors. *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280, 284 (S.D.N.Y.) (three-judge district court), *aff'd*, 445 U.S. 955 (1980). Public financing eliminates such obligations by providing generous federal funding at the outset of a Presidential campaign, thus encouraging Presidential candidates to forswear private fundraising:

> "If the candidate chooses to accept public financing he or she is beholden unto no person and, if elected, should feel no post-election obligation toward any contributor of the type that might have existed as a result of a privately financed campaign." *Id.*

Congress' objective of eliminating the dangers inherent in private fundraising was best expressed by Senator Pastore, the Fund Act's sponsor, when he declared: "Let's be done with it. Let the president be a free and independent man. Let him not be beholden to anyone." 119 Cong. Rec. 38900 (1973).

26 U.S.C. § 9012(f) is highly important to the attainment of Congress' objective. A candidate can easily become beholden (or appear to be beholden) to influential political operators who control and spend large sums of money, amassed from private contributions, in support of the candidate. It is therefore essential to the integrity of the Fund Act's public financing scheme that such activities be limited. Congress did just that in Section 9012(f), which makes it unlawful for any "political committee which is not an authorized committee" to "incur expenditures [in excess of $1,000] to further the election of" a Presidential candidate who has accepted public financing.

It was also essential to the integrity of the public financing scheme that Section 9012(f) apply to "independent" political committees, as well as to political committees that are affiliated or coordinated with a publicly financed candidate's campaign. Neither overt coordination nor clandestine consultation is necessary to render a Presidential candidate beholden to his benefactors, or to create the appearance that he is beholden to them; the candidate's benefactors know how to help him, and the candidate knows full well who is helping him and how much help he is getting. Thus, expenditures by independent political committees—particularly those run by party professionals who raise and command multi-million-dollar war chests—pose every bit

as much potential for creating "implicit obligations" as do coordinated expenditures.

Section 9012(f) would, moreover, be unworkable and ineffective if it reached only political committees that are affiliated or coordinated with the candidate's official campaign. The Congress that enacted the Fund Act in 1971 knew first-hand that "independent" political committees were often used as vehicles for evading the existing Federal limits on campaign contributions and expenditures.[19] The ease with which such evasion could be carried out required that independent political committees also be encompassed within Section 9012(f).[20] Congress' action was thus fully in accord with this Court's admonition not to "naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence. . . ." *Buckley* v. *Valeo*, 424 U.S. at 45.

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[19] *See* Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 365 (1977):

> "These federal ceilings on both contributions and expenditures were widely circumvented through the proliferation of committees. Committees openly supporting candidates called themselves independent, claiming to operate without the knowledge or consent of the candidates . . . . Often they were vest pocket committees."

See also H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 5 (1976) (". . . [P]rior to 1971 the laws regulating Federal campaigns permitted an infinite proliferation of political committees which were ostensibly separate entities but which were in fact a means for advancing a candidate's campaign.").

[20] It would be exceedingly difficult to enforce effectively a prohibition reaching only political committees that are coordinated with the candidate's official campaign organization. Such coordination is very difficult and time-consuming to prove, particularly when (as will usually be the case) the committee has tried to mask it. The few months that elapse from the start to the end of the general election campaign would in most cases not provide enough time to develop proof of coordination, even under procedures far more accelerated than those the Commission is required to follow. *See* 2 U.S.C. § 437g.

Public financing simply cannot work if a handful of political professionals are free to solicit millions of dollars from contributors and pump them into a parallel (but "unofficial") campaign on behalf of a candidate despite his agreement to give up private financing as a condition of receiving the public grant. The Fund Act would, therefore, be seriously undermined if the district court's invalidation of Section 9012(f) were allowed to stand.

Because "public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest," *Buckley*, 424 U.S. at 96, the issues involved in this case are important. Indeed, they are "not less than basic to a democratic society," since "what is involved here is the integrity of our electoral process . . ." *United States* v. *Automobile Workers*, 352 U.S. at 570. For that reason alone, this case warrants plenary consideration.

B. This Case Poses Substantial Constitutional Issues Concerning The Application of *Buckley* v. *Valeo*.

1. *This Case Involves Constitutional Questions Not Previously Considered by this Court.*

This Court has recognized that the Fund Act serves important governmental interests and has twice upheld it against constitutional attack. In *Buckley* v. *Valeo*, the Court stated that the Fund Act "furthers, not abridges, pertinent First Amendment values." 424 U.S. at 93 (footnote omitted). The Court there upheld the Fund Act against challenges that its enactment exceeded Congress' authority under the General Welfare Clause and that it unlawfully discriminated against the candidates of non-major parties. *Id.* at 85-109. And later, in *Republican National Committee* v. *Federal Election Commission*, *supra*, this Court rejected First Amendment and other challenges to the Fund Act's prohibitions against contributions to and excess expenditures by publicly financed candidates.

In those cases, this Court did not have occasion to consider either 26 U.S.C. § 9012(f) or "independent" campaign activities of the kind that appellees have carried on. The Fund Act's public financing scheme had never been used when, in January 1976, this Court decided *Buckley*. Public financing was first used later that year, in the 1976 general election, when both major-party candidates opted to receive public financing. Both major-party candidates also chose to receive public financing for the 1980 election. Only in 1980, however, did there emerge "independent" political committees, such as appellees, running nationwide fundraising and media campaigns in support of publicly funded candidates. Such activities and the dangers they pose were not before this Court for consideration in *Buckley*.

Nor were such matters before the Court in the *Republican National Committee* case. Although some of the briefs (including that of appellant Common Cause) discussed the right of individuals to use as much of their own money as they wish for independent expenditures,[21] none of the briefs (and none of the opinions) anticipated the creation of "independent" political committees, run by party professionals, that mount parallel national campaigns using millions of dollars amassed through private contributions. Like *Buckley*, the *Republican National Committee* case was decided before activities such as those of appellees emerged on the election landscape. As a result, those activities were not addressed by this Court.

By basing its discussion of independent expenditures on election practices as they "presently appear[ed]," 424

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[21] *See, e.g.*, Brief of *Amici Curiae* Common Cause, David Cohen and Nan Waterman in Support of Appellees' Motions To Affirm (U.S., Nos. 79-1373, 79-1374, 79-1375, filed March 24, 1980), at 10 ("Individuals may spend without limit to support their chosen candidate in ways that are not coordinated with the candidate's campaign." (footnote omitted)).

U.S. at 46, this Court in *Buckley* recognized that new patterns of conduct might require consideration in future cases. This is such a case. It involves multi-million-dollar fundraising schemes not previously considered by this Court, as well as the constitutionality of an important statutory provision that this Court has never before discussed. Under these circumstances, the Court should insist upon full briefing and argument.

2. *The District Court's Constitutional Analysis Was Erroneous.*

The district court committed fundamental errors of constitutional analysis, which were caused in large measure by its adoption of unsupported and incorrect factual premises. These deficiencies in the district court's decision make it especially important that this Court give the case plenary consideration.

a. The district court erroneously applied the constitutional distinction between contributions and expenditures.

In *Buckley* this Court drew a constitutional distinction between contributions and expenditures. 424 U.S. at 20-21. "A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* at 21. For that reason, contributions involve only "marginal" First Amendment interests. *Id.* at 20. The marginal First Amendment significance of contributions is not affected by the fact that their recipients may spend them for speech:

> "While contributions may result in political expression if spent by a candidate *or an association* to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 21 (emphasis added).

The district court misapplied the distinction between contributions and expenditures. The core feature of appellees' operations is the mass solicitation and aggregation of *contributions*. The district court's analysis, however, was bottomed on the assertion that this case "is an 'expenditure' case because it is precisely the speech of individual contributors which is hampered by the statutory restriction." App. 15a. That assertion demolishes the contribution-expenditure distinction drawn by this Court. The whole point of the distinction is that making individual contributions is *not* tantamount to expressing "the underlying basis for the support," even if the money contributed is later transformed "into political debate . . . by someone other than the contributor." 424 U.S. at 21.

There is no valid basis in constitutional doctrine for the district court's assertion that contributions to a political committee are equivalent to the discussion of candidates and issues by the contributors. *See Buckley*, 424 U.S. at 21. The district court premised its assertion on its factual finding that "speech promulgated through a political committee bears a different relation to its constituent contributors than does a candidate's speech to his or her constituent supporters (or, contributors to the non-publicly funded candidate)." App. 17a. But this attempt to draw a line between contributions to candidates and contributions to political committees is both unsupported in the record and constitutionally erroneous. As this Court noted in *Buckley*, contributions retain their "marginal" First Amendment nature even when they are later transformed into political debate "by a candidate *or an association*." 424 U.S. at 21 (emphasis added).

The district court relied upon a number of other factual assertions to justify its departures from this Court's analysis in *Buckley*. Those assertions, however, lacked any foundation in the record.

First, there is no basis for the district court's statement that 26 U.S.C. § 9012(f) hampers "the speech of individual contributors." App. 15a. The record does not support the proposition that individual contributors, by sending checks to appellees in response to mass-mailed solicitation letters, were doing anything more than engaging in "the undifferentiated, symbolic act of contributing." *Buckley*, 421 U.S. at 21. Section 9012(f) clearly "does not in any way infringe the contributor's freedom to discuss candidates and issues," *id.*, for it allows each contributor to spend as much of his own money as he wishes for his own political speech. *See* note 23 *infra*.

There is also no basis in the record for the district court's characterization of the relationship between political committees and their contributors, a characterization that is fundamental to the court's analysis. The court stated that "[t]he organizers of independent political committees, as agents and unlike candidates, are tied by their commitments to their particular contributors," App. 18a, and that "[t]he contributors do have power over the speech disseminated by the political committees." App. 16a. But so far as the record showed, contributors to the appellee committees did not have any effective control over the committees' expenditure decisions. The decisions were made by the political professionals who organized the committees, solicited contributions through mass mailings and ran the committees' operations. The district court thus based its constitutional analysis on a model of a "political committee"—involving a true consensual relationship between the committee and its contributors, and in which the contributors exercise effective control over the committee's operations—that bore no relationship to the situation before the court.[22]

[22] The model upon which the district court's analysis rested is, in fact, not even a "political committee" within the meaning of the Fund Act. It is, rather, a group of persons who pool and spend

b. The district court erroneously concluded that 26 U.S.C. § 9012(f) imposes a significant burden on expression and association.

Section 9012(f) leaves every individual free to further the election of a publicly financed candidate by spending as much of his own money as he wishes. It also leaves groups of individuals free to pool their own money and to spend it themselves, again without limit.[23]

Because Section 9012(f) places no restrictions on such expenditures, it does not reduce the total amount of money that can be spent for expression in support of a candidate.[24] It merely requires, at bottom, that speakers spend their own money rather than someone else's. Section 9012(f), in its effect, thus tracks exactly the constitutional distinction between contributions and expenditures drawn by this Court in *Buckley*:[25] It channels the

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their own money, without giving up control over it. The distinguishing feature of a Fund Act "political committee" is that the money it spends is mailed in by contributors who do not have control over the expenditures; a "political committee" thus spends other people's money.

[23] The legislative history of the Fund Act makes it clear that 26 U.S.C. § 9012(f) does not limit independent expenditures by individuals. H.R. Rep. No. 92-708, 92d Cong., 1st Sess. 58 (1971). The legislative history also makes it clear that Congress did not intend Section 9012(f) to apply to all organizations or groups. 117 Cong. Rec. 42398 (1971).

[24] Thus, 26 U.S.C. § 9012(f) differs drastically from the provisions invalidated in *Buckley*. *See* 424 U.S. at 39 ("It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates.").

[25] This Court is of course required, if possible, to construe a challenged statute in a way that saves it from constitutional infirmity. *E.g., Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974); *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 571 (1973). No special narrowing construction is necessary here, however, since the construction of Section 9012(f) dictated by the text and the legislative history coincides exactly with the constitutional requirements of *Buckley*.

money of individuals into personal political expression rather than into uses (*i.e.*, contributions) that involve only "marginal" First Amendment interests. *See* 424 U.S. at 20. Section 9012(f) thus fosters First Amendment goals, because it promotes direct individual involvement in the election process, and thereby helps to "sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *United States* v. *Automobile Workers*, 352 U.S. at 575.

The district court therefore committed a serious error in according no constitutional significance to the fact that Section 9012(f) leaves individuals free to spend as much of their money as they wish in support of a candidate. App. 21a-22a. As this Court made clear in *Buckley*, the absence of restrictions on a person's right to express his views, as an individual, on political issues and candidates *is* constitutionally significant. *See* 424 U.S. at 27 n.29 and 48 n.54 (discussing *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548 (1973)). The court below disregarded this important point, because it mistakenly viewed the holding in *Buckley* as invalidating even independent expenditure restrictions that, like Section 9012(f), apply only to "political committees" and not to individuals or groups of individuals. App. 21a. But the statute invalidated in *Buckley* had restricted independent expenditures by all individuals and all groups *as well as* by political committees.[26] *See*

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[26] Thus, while *Buckley* held that Congress may not constitutionally enact a sweeping statute restricting all independent expenditures, it left open the question whether Congress may enact a much narrower provision that—like Section 9012(f)—regulates only independent expenditures by "political committees."

The district court erred in suggesting that this Court, in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), gave a negative answer to the question left open in *Buckley*. App. 21a & n.42. In fact, the *Bellotti* opinion points clearly toward an affirma-

424 U.S. at 39-40 (discussing former 18 U.S.C. § 608 (e)(1)). That statute had, therefore, imposed burdens on political expression that were vastly greater than whatever minimal burdens may be imposed by Section 9012(f).

The district court also erred in concluding that Section 9012(f) significantly impairs associational freedoms. App. 22a-24a. Section 9012(f) does not restrict any person's ability to associate himself with any candidate, political party, committee, group, or other entity. All it regulates is the use by political committees of money contributed in response to mass solicitation appeals. The only associational interests affected by Section 9012(f) are, therefore, the "marginal" interests inherent in making contributions, 424 U.S. at 20, and, under *Buckley*, limitations on those interests are constitutionally permissible. Section 9012(f) has a much smaller impact on association than did "the Hatch Act's broad restrictions on the associational freedoms of federal employees" that this Court, emphasizing the absence of any limitation on individual expression, previously upheld. *Buckley*, 424 U.S. at 48 n.54 (discussing *Civil Service Commission* v. *Letter Carriers*, *supra*).

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tive answer, one that supports the constitutionality of Section 9012(f):

> "The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. . . . The importance of the governmental interest in preventing this occurrence has never been doubted. . . . *Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures* by corporations to influence candidate elections. *Cf. Buckley* v. *Valeo*, *supra*, at 46 . . . ."

435 U.S. at 788 n.26 (emphasis added).

c. The district court erroneously concluded that 26 U.S.C. § 9012(f) does not serve important governmental interests.

The district court erred in concluding that Section 9012(f) does not serve important governmental interests. App. 19a-21a. Congress correctly saw a grave risk that a Presidential candidate who opts for public financing—and whose campaign expenditures may therefore not exceed the amount of the public financing grant—will be beholden (or appear to be beholden) to persons who raise and spend an additional $3 million, $5 million or $20 million on his behalf. The risk is just as grave as that created by contributions in those amounts. *See* pages 16-19 *supra*.

In the district court's view, the mere fact (if, indeed, it is a fact) that a political committee operates independently of the candidate's official campaign eliminates any danger that the candidate, once elected, will be beholden to his benefactors. App. 19a. The court's view, which was not supported by anything in the record, rested on a mistaken understanding of what this Court said in *Buckley*. According to the district court, this Court felt that independent expenditures "*could not* pose the same *quid pro quo* problem" as contributions. App. 19a (emphasis added). What this Court in fact said was that "the independent advocacy restricted by the provision *does not presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." 424 U.S. at 46 (emphasis added). This Court thus recognized the possibility that such dangers might arise in the future.[27] This Court's observation was made before the Fund Act had ever been used, and long before anyone had attempted to use nationwide, professionally-

[27] This Court reiterated that recognition in *First National Bank of Boston* v. *Bellotti*, citing to the pertinent page in *Buckley*. *See* note 26 *supra*.

run unofficial campaign organizations as vehicles for circumventing the Act's prohibition against contributions to and excess expenditures by publicly financed candidates. The dangers that were not "presently" apparent then are patently obvious now.

In reaching its conclusion that political committees such as appellees pose no danger of creating improper political debts (or the appearance of such debts), the district court examined the wrong end of the process. Instead of focusing on the obvious influence wielded by the key operators who run the political committees and control their aggregated funds, the court focused on the lack of influence of the many essentially anonymous contributors.[28] Thus the court stated: "It is difficult, then, to imagine how the thousands of 'small voices' associated together in a political committee could compromise a candidate for President." App. 19a-20a. The danger, of course, does not result from any chorus of "small voices." It results, rather, from the big sticks—the multi-million-dollar campaign funds—that are wielded for the candidate's benefit by a handful of political pros.

Because of its incorrect focus, the district court failed to consider whether political committees such as appellees might, by concentrating massive funds in the hands of a few political operators, pose a danger of political debts, or the appearance of such debts, far beyond that posed by individuals. As a result of its oversight, the district court simply missed the basic, and compelling, justification for the enactment of 26 U.S.C. § 9012(f).

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[28] The source of the district court's incorrect focus was its reliance on an erroneous and unsupported model of political committees—a model that, as discussed above, pictured the contributors as actually controlling the committees. But the case before the court involved political committees in which the contributors were strangers to the committees' operations and—so far as the record showed—did nothing more than contribute money to funds controlled by the committees' managers. *See* notes 9 and 22 *supra*.

CONCLUSION

For the foregoing reasons, the Court should summarily reverse the decision below and remand the case to the district court with directions to develop a factual record. In the alternative, the Court should note probable jurisdiction of this appeal and set it down for plenary briefing and argument.

Respectfully submitted,

Of Counsel:

KENNETH J. GUIDO, JR.
ELLEN G. BLOCK
DONALD J. SIMON
COMMON CAUSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1200

LOUIS R. COHEN
MICHAEL L. BURACK *
ROGER M. WITTEN
CLIFFORD B. HENDLER
WILMER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Attorneys for Appellants

* *Counsel of Record*

November 25, 1980

Supreme Court, U. S.
FILED
NOV 25 1980
MICHAEL RODAK, JR., CL

80-847

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMON CAUSE, ET AL.,
Appellants,

v.

HARRISON SCHMITT, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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APPENDICES TO THE JURISDICTIONAL STATEMENT

Of Counsel:

KENNETH J. GUIDO, JR.
ELLEN G. BLOCK
DONALD J. SIMON
COMMON CAUSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1200

November 25, 1980

LOUIS R. COHEN
MICHAEL L. BURACK *
ROGER M. WITTEN
CLIFFORD B. HENDLER
WILMER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Attorneys for Appellants

**Counsel of Record*

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*The District Court did not enter any separately denominated judgment in these cases.

** The Exhibits to the Amended Complaint could not practicably be reproduced in this volume. They have, accordingly, been lodged with the Court under separate cover.

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CA 80-1609 (Consolidated)

Three-Judge Court

COMMON CAUSE, ET AL.,
Plaintiffs

v.

HARRISON SCHMITT, ET AL.,
Defendants

FEDERAL ELECTION COMMISSION,
Intervenor

CA 80-1754

Three-Judge Court

FEDERAL ELECTION COMMISSION,
Plaintiff

v.

AMERICANS FOR CHANGE, ET AL.,
Defendants

Case heard before *Circuit Judges* TAMM and WILKEY, and *District Judge* PENN, Three-Judge District Court.

Opinion filed for the court by *Circuit Judge* WILKEY.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA 80-1609 (Consolidated)

Three-Judge Court

COMMON CAUSE, ET AL.,
Plaintiffs

v.

HARRISON SCHMITT, ET AL.,
Defendants

FEDERAL ELECTION COMMISSION,
Intervenor,

CA 80-1754

Three-Judge Court

FEDERAL ELECTION COMMISSION,
Plaintiff

v.

AMERICANS FOR CHANGE, ET AL.,
Defendants

OPINION

WILKEY, *Circuit Judge:*

The Federal Election Commission ("FEC"), and Common Cause, a public interest organization, sued in two separate actions various groups of Ronald Reagan supporters who plan to spend monies to promote his chances in the 1980 presidential election. Both plaintiffs alleged that the plain language of section 9012(f) of the Presidential Election Campaign Fund Act ("Fund Act")[1] prohibits the defendants' proposed expenditures

[1] 26 U.S.C. § 9001 *et seq.* (1976).

which will exceed $1,000 to further the election of Ronald Reagan. As the Republican candidate for President, Mr. Reagan is entitled under the Fund Act to receive, and has already accepted, almost $30 million in public campaign funding. Pursuant to 26 U.S.C. section 9011(b) this three-judge district court was convened with jurisdiction to "implement or construe" the Fund Act. The statute further directs the court to act as quickly as practicable. On 19 August 1980 we heard oral argument on the scope and constitutionality of section 9012(f). On 28 August 1980 the court issued two expedited Orders granting, *inter alia*, summary judgment for the defendants in the FEC action, and dismissing the Common Cause action. In this Opinion we develop our reasoning for the two Orders of 28 August.

I. STATUTORY PROHIBITION AGAINST EXPENDITURES BY POLITICAL COMMITTEES

A. *Background*

The defendants in both actions are various organizations, as well as a few of their organizers, who are broadly soliciting contributions from individuals who favor Ronald Reagan for president. These organizations plan to use the money they collect—they hope to raise and spend millions of dollars—to hire professional media and political consultants and purchase advertising, *etc.* They intend these expenditures to yield an effective program to promulgate their political views before the November election. The defendant organizations have registered with the FEC as "political committees." [2]

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[2] A "political committee" is

> any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influ-

The defendants' literature and solicitation materials detail their support for Ronald Reagan and outline their intention to spend the sums collected to realize their collective aspirations for the presidential election.

B. *Statutory Basis: Jurisdiction and Substantive Prohibition*

1. *Jurisdiction in a Three-Judge District Court*

The FEC is plainly authorized by section 9011(b)(1) of the Fund Act to seek a declaratory judgment "that section 9012(f) validly prohibits expenditures in excess of $1,000 such as defendants have indicated they intend to undertake."[3] The statute is set out in full in the margin.[4] The right of Common Cause to bring such an

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ence, the nomination or election of one or more individuals to Federal, State, or local elective public office.

26 U.S.C. § 9002(9) (1976).

Under another statute, the Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. § 433(a) (1976), any "political committee" that is not an authorized campaign committee must file a statement of organization with the FEC within 10 days after becoming a political committee within the meaning of 2 U.S.C. § 431(4). The definition of "political committee" within the FECA is roughly the same as the definition of that term in the Fund Act.

[3] Motion of FEC for Summary Judgment at 30.

[4] 26 U.S.C. § 9011(b) (1976) provides:

§ 9011. Judicial review

(b) Suits to implement chapter.—

(1) The Commission, the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or contrue [*sic*, quoted here as "construe"] any provision of this chapter.

(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this

action, on the other hand, is equivocal. We will reserve all discussion of the Common Cause lawsuit until Parts IV and V below.[5]

The statute requires a three-judge district court to entertain actions to "implement or construe" the Fund Act. This action to test the scope and validity of section 9012(f) is within the jurisdiction of this court to "implement or construe" provisions of the Act.

2. *Prohibition Against Expenditures by "Political Committees"*

The plain language of section 9012(f) proscribes categorically the defendants' planned expenditures. They, the defendant "political committees," plan "to incur expenditures" "in an aggregate amount exceeding $1,000" "to further the election" of presidential candidate Reagan. This program of expenditures is a criminal offense according to the statutory section which is entitled "Criminal penalties." In pertinent part it reads:

§ 9012. Criminal penalties

(f) Unauthorized expenditures and contributions.—

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subsection and shall exercise the same without regard to whether a person asserting rights under provisions of this subsection shall have exhausted any administrative or other remedies that may be provided at law. Such proceedings shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

[5] Common Cause requested substantial discovery of defendants as well as injunctive relief, neither of which was integral to the FEC complaint. *See* Parts IV-V *infra*.

> (1) Except as provided in paragraph (2), it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.
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> (3) Any political committee which violates paragraph (1) shall be fined not more than $5,000, and any officer or member of such committee who knowingly and willfully consents to such violation and any other individual who knowingly and willfully violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than one year, or both.

We understand section 9012(f)(1) to prohibit *all* expenditures over $1,000 by political committees including "*independent expenditures.*" An independent expenditure is an expense incurred by a political committee free of any coordination with the official and authorized campaign committees of the candidate. We reject the limiting construction of section 9012(f) offered by defendants Harrison H. Schmitt, Carl T. Curtis, and Americans For Change. They suggest that the provisions may be interpreted as prohibiting only coordinated expenditures which have been authorized or requested by a publicly funded presidential candidate.[6] Though this "saving" construction would neatly preserve the statutory proscription from constitutional infirmity under *Buckley*

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[6] *See* Memorandum of Points and Authorities in Support of Motion to Dismiss of Defendants Harrison H. Schmitt, Carl T. Curtis and Americans For Change at 10-13.

v. *Valeo*[7] the language of the section will not support this rescue.

The section's plain terms apply broadly to *all* expenditures and this is in contrast with another section, section 9002(11) of the Fund Act, where Congress did adopt limiting language of this kind. If the limiting construction were correct, that is, if the expenditure prohibition applied only to expenditures authorized or requested by the candidate, then the section's existing proviso that only such expenditures are prohibited as "would constitute qualified campaign expenses if incurred by an authorized committee of [the] candidate[]" would be more or less superfluous. The prohibited coordinated, or non-independent, expenditures would then *all* be qualified campaign expenses[8] rendering the proviso unnecessary.

Also, another election law statute, 2 U.S.C. section 441a(a)(1)(A), already prohibits individuals, groups, and committees from making contributions in excess of $1,000. A "contribution," however, is defined, in 2 U.S.C. section 441a(a)(7)(B)(i), to include "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate. . . ." Hence we can only read the expenditure prohibition in section 9012(f) to mean what it says: *all expenditures* over $1,000 by political committees which further a presidential candidate's election are illegal. We are compelled then to determine the constitutionality of this expenditure limitation consistent with the First Amendment analysis conceived in *Buckley* v. *Valeo*.[9]

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[7] 424 U.S. 1, 46-47, & n. 53 (1976).

[8] *See* 26 U.S.C. § 9002(11) (1976).

[9] 424 U.S. 1 (1976).

II. FIRST AMENDMENT ANALYSIS UNDER *BUCKLEY* v. *VALEO*

In *Buckley* v. *Valeo*[10] the Supreme Court held that the campaign expenditure ceilings imposed by Congress in the Federal Election Campaign Act of 1971 ("FECA")[11] were unconstitutional. The Court reasoned that a statutory restriction on amounts which citizens, groups, or candidates could expend in a political campaign was an impermissible limitation of the freedoms of speech and association protected by the First Amendment. The watershed case controls the election law case before this court. Thus a discussion of *Buckley* is appropriate before beginning our own constitutional analysis of the severe expenditure ceiling imposed on political committees.

A. *Campaign Expenditures Are Speech*

The Supreme Court made quite clear in *Buckley* that the power of Congress to regulate federal elections was well-established under the Constitution.[12] That power to regulate, however, is not unbounded; it must of course be exercised consistent with rights guaranteed by the Constitution.

Campaign activity is speech on the highest constitutional plane. "The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "[13] Moreover, political expression in a campaign

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[10] *Id.* at 12-59.

[11] 2 U.S.C. § 431 *et seq.* (1976).

[12] *Buckley* v. *Valeo*, 424 U.S. at 13.

[13] *Id.* at 14 (quoting *Roth* v. *United States*, 354 U.S. 476, 484 (1957)).

is associational activity also protected by the First Amendment. The Constitution guarantees the " 'freedom to associate with others for the common advancement of political beliefs and ideas,' a freedom that encompasses '[t]he right to associate with the political party of one's choice.' " [14]

The Supreme Court noticed in *Buckley* the reality that public communication is expensive. Free speech is costly. Television, radio, newspapers, buttons—the Court has acknowledged that "these expensive modes of communication [are] indispensable instruments of effective political speech." [15] A restriction on the amount which can be spent on political communication is a practical limitation on the political issues which can be addressed or answered in a campaign. It also limits the range of participants in the political debate, and the size of the audience.

B. *Level of Judicial Scrutiny*

It was strenuously argued to the Supreme Court in *Buckley* that *expenditures* in a campaign entailed primarily "conduct" and not "speech." The Court rejected this contention emphatically,[16] stating that "this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to in-

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[14] *Id.* at 15 (quoting *Kusper* v. *Pontikes*, 414 U.S. 51, 56, 57 (1973) (*quoted in Cousins* v. *Wigoda*, 419 U.S. 477, 487 (1975)).

"The First Amendment protects political association as well as political expression." *Buckley* v. *Valeo*, 424 U.S. at 15. The Court noted that the constitutional right of association was derived from the role of group association to advocate *effectively* public and private points of view. *Id.* (citing *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958)).

[15] *Id.* at 19.

[16] *Id.* at 16.

troduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." [17] "[T]he governmental interests advanced in support of the Act [*i.e.*, FECA] involve 'suppressing communication.' The interests served by the Act include restricting the voices of people and interests groups who have money to spend and reducing the overall scope of federal election campaigns." [18] Following *Buckley*, then, it is plain that election laws regulating political expression require a demonstration of "compelling governmental interest" to withstand a constitutional challenge calling for "strict scrutiny" by the reviewing court.

C. *Compelling Governmental Interest*

The Supreme Court considered three governmental interests adduced to support the contribution and expenditure ceilings: to prevent corruption, or, the appearance of

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[17] *Id.* (citations omitted).

> Unlike [*United States* v.] *O'Brien*, [391 U.S. 367 (1978) (draft-card burning case)] where the Selective Service System's administrative interest in the preservation of draft cards was wholly unrelated to their use as a means of communication, it is beyond dispute that the interest in regulating the alleged "conduct" of giving or spending money [in a campaign] "arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." 391 U.S., at 382.

Id. at 17.

Obviously Congress *intends*, albeit neutrally, to regulate the speech-potential of money contributions and expenditures through the election laws it enacts. The giving and spending of money is alluring to the candidate because of the speech-potential it provides to him or her, while to Congress that particular speech-potential also represents the enticement that could be the wedge of corruption, tainting the candiate and the election process. Thus Congress's regulatory intention with respect to campaign contributions and expenditures necessarily involves the regulation of speech.

[18] *Id.* at 17.

corruption; to mute the voices of affluent groups and persons; and, to put a "brake" on the ballooning cost of election campaigns.[19] Only the first interest, to squelch corruption, was held constitutionally sufficient to support the FECA's $1,000 contribution limitation—a limitation on speech. The Court was crystal-clear in stating that Congress had no valid power to "equaliz[e] the relative ability of individuals and groups to influence the outcome of elections . . ."; because, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." [20]

In short, the Court has indicated the prevention of corruption is the singular compelling governmental interest justifying the limit on maximum contributions to candidates. Congress has constitutional authority, the Court held, to ensure that the marketplace of ideas in an election is not recast as a marketplace of "influence."

D. *Constitutional Distinction Between Contributions and Expenditures*

The Court *did not accept* that even the compelling anti-corruption governmental interest supported a limitation on *expenditures* in a campaign. The Court reasoned that limitations on *expenditures* were more restrictive of First Amendment rights than limitations on *contributions*, hence the congressional objective to protect the new contribution ceilings by closing the so-called loop-hole of "independent" expenditures was constitutionally insufficient.[21] Preventing corruption would justify the contribution ceilings but would not also justify expenditure ceilings that redress only tangentially the corruption problem (*i.e.*, by "protecting" contribution limits from circumvention), yet severely impinge on free speech rights.[22]

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[19] *Id.* at 25-26.

[20] *Id.* at 48-49.

[21] *Id.* at 44.

[22] *Id.* at 45.

Controlling contributions, the Court believed, would exorcise *quid pro quo* from the political scene.[23] Impeding the opportunity for venal politician/contributor relationships was a constitutionally valid means of accomplishing the governmental interest in fighting corruption. Contribution ceilings preserve electoral integrity without directly impinging on the rights of individuals.[24] On the other hand, "the independent advocacy restricted by the [expenditure] provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."[25] For, "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive."[26]

The right of citizens and groups to make expenditures in a campaign poses, according to the Court, only the most attenuated danger of *quid pro quo*. Evidently, spending money can just not be equated with *giving* money as a source of possible corruption. The Court noted that the threat of corruption in political spending was mitigated to a large extent by coupling unlimited expenditures with a strict restriction on contributions (which the Court upheld). There was no evil in collecting small amounts from myriad individual contributors and then translating those funds into political communication spreading the candidate's message.[27] Thus the Court struck down FECA's section 608(e)(1) which limited independent expenditures, saying, "[t]hese provisions place substantial and direct restrictions on the ability of candidates, citizens, *and associations* to engage

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[23] *Id.*

[24] *Id.* at 58.

[25] *Id.* at 46.

[26] *Id.* at 47.

[27] *See id.* at 56 & n.64 (quoting from Judge Tamm's separate opinion, concurring in part and dissenting in part, *Buckley* v. *Valeo*, 519 F.2d 821, 917 (D.C. Cir. 1975)).

in protected political expression, restrictions that the First Amendment cannot tolerate." [28]

A final perspective on *Buckley's* requirement of unlimited expenditures [29] comes from the more recent explication of the election laws in the *Republican National Committee* v. *Federal Election Committee* trilogy.[30] These cases upheld public financing of presidential elections. Candidates, the constitutional rationale goes, are permitted to forgo their own right to private contributions and unlimited expenditures in exchange for (exclusive) financing from the public coffers. This is a voluntary decision made by the candidate, presumably, because the candidate believes that his or her political communication is enhanced by public funding, even given the restrictions. The candidate's decision, however, cannot bind his or her supporters outside the official campaign. Public funding—and the election law after *Buckley*—leaves open to supporters a wide range of means to express their support and their politics. In fact, *Republican National Committee* would appear to mean that the restrictions associated with public funding (*e.g.*, no private contributions, expenditure ceilings, etc.) are permissible only because the rights of supporters are left untouched. "Most important", reflected the court, is that "uncoordinated expenditures are permitted without limit. Limitations on

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[28] *Id.* at 58-59 (emphasis added).

[29] Pivotal to the Court's analysis of electoral integrity *vis a vis* independent expenditures was the statutory provision that "controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act." *Id.* at 46. The Court recognized that it was one thing for Congress to restrict expenditures free from the candidate's control, but quite another for Congress (validly) to limit sham, "independent" expenditures, which being in the candidate's effective control amounted to nothing more than masked contributions and could be regulated as such.

[30] 100 S.Ct. 1639 (1980), *aff'g summarily*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *and*, 616 F.2d 1 (2d Cir.) (*en banc*).

uncoordinated expenditures were held unconstitutional in *Buckley* v. *Valeo*." [31]

III. SECTION 9012(f) LIMITATIONS ON EXPENDITURES BY POLITICAL COMMITTEES INHIBITS FIRST AMENDMENT FREEDOMS

The foregoing discussion of *Buckley* indicates the dubious constitutional quality of election law ceilings limiting amounts which may be independently expended in a campaign. The *Republican National Committee* cases still reserve a highly protected status for *independent expenditures* even since the advent of (conditional) public funding for presidential candidates (who accept the terms). Now we turn to our own constitutional analysis of section 9012(f)'s prohibition of independent expenditures by political committees in excess of $1,000. This analysis turns on two fundamental questions which will explore whether section 9012(f) is consistent with the First Amendment after *Buckley*: (1) Does the proposed spending by the defendant political committees constitute an "expenditure" question under *Buckley?*, and (2) Are political committees, under *Buckley*, entitled to the same First Amendment rights to make independent expenditures as individuals and "informal groups?" We answer both questions affirmatively and hold that section 9012(f) is facially unconstitutional.

A. *Political Committee Prohibition Is an Expenditure Limitation and Thereby Limits Speech*

Under *Buckley* and the *Republican National Committee* cases the right of individuals and groups (outside of

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[31] *Republican National Committee* v. *Federal Election Committee*, 487 F. Supp. 280, 286 (S.D.N.Y.) (three-judge court), *aff'd summarily*, 100 S.Ct. 1639 (1980) (citing *Buckley*, 424 U.S. at 39-51).

official campaigns) to make independent expenditures is a constitutional pillar of the election laws. Supporters of candidates have rights separate from the candidates they favor, rights which cannot be alienated by the candidate's choice with regard to public funding.[32] There is no constitutional reason that the organization of individual supporters of a candidate into groups called "political committees" should inpugn the distinct and separate rights of campaign outsiders to sponsor political speech. Independent expenditures are the principal—and protected—source of this sponsorship.

1. *This is Not a "Contribution" Case*

Buckley indicated clearly that expenditure limitations jeopardize First Amendment rights more severely than do limitations on contributions.[33] Consequently, *Buckley* held that the governmental interest in cleansing the electoral process of possible corruption was not enough to validate restrictions on expenditures. A "contribution" case, on the other hand, is entitled to less-exacting judicial scrutiny because "the transformation of contributions into political debate involves speech by someone other than the contributor."[34] The case before this court is an "expenditure" case because it is precisely the speech of individual contributors which is hampered by the statutory restriction.

The defendant political committees are simply "pooling agents" for many small voices wishing to make intelligible political statements. The money expended by the committees pays for political communications which speak

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[32] *See Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280, 285-86 (S.D.N.Y.) (three-judge court), *aff'd summarily*, 100 S.Ct. 1639 (1980).

[33] *See* Part II. D. *supra*.

[34] *Buckley* v. *Valeo*, 424 U.S. at 21.

the language of their members and contributors. It is the speech of the contributors which is defrayed by the contributions. Earlier, we noted that political speech is expensive nowadays. It requires a lot of money and a lot of sophistication to yield effective communication in the political arena. Political committees pool money from individuals who are interested in politics and amplify their shared viewpoint into an efficient political message. A simple example explains the efficiency argument: One thousand politically motivated persons could each afford to buy a short classified advertisement in one thousand local newspapers; if, however, they join together, pool funds and integrate planning, they can purchase perhaps an advertisement in a national magazine, or a commercial on network television. There can be little doubt that an economy of scale enhances the informational impact of larger units of communication. Since it is beyond contention that individuals and "informal groups" may make unlimited independent expenditures to express their First Amendment rights, political committees may not be denied the same right merely because they are *efficient* groupings of like-minded individuals.

2. *Individuals Speak Through Political Committees*

The communication sponsored by the political committees is the language of their members and contributors because the contributions are made based on an understanding and community of political interest among all of the contributors and their political committees. The contributors do have power over the speech disseminated by the political committees. Political speech like this is possible in the first instance only because the contributors contribute to one particular committee or another. Contributors associate in a particular political committee because that committee will express their own thoughts, which benefit thereby from amplitude in numbers and professionalism. If a committee disappoints its membership, contributions will dry up.

To require that contributors to political committees literally draft their own television and other public messages is naive. These contributors express themselves through political committees—their First Amendment rights are not merely coextensive with their actual participation in drafting specific language. The language drafted by the steering groups of the political committees reflects the political speech common to all of the member-contributors. That the language and format employed in the groups' public political communications have a professional touch does not make it any less the language of the individual contributor; one of the things he or she most wants is the professional touch to make his or her speech efficient and effective in the modern age. One thousand individuals have just as much right to join together to do this as one man or woman to do it alone. It emasculates the guaranteed right of association to disallow political committees from organizing and focusing the views of their adherents.[35] Thus the expenditures undertaken by the political committees represent an efficient exercise of First Amendment rights of associated individuals. This exercise warrants the highest protection under *Buckley* and *Republican National Committee.*

3. *Speech Emanating from Political Committees Is Different from a Candidate's Speech*

A word is in order to point out how speech promulgated through a political committee bears a different relation to its constituent contributors than does a candidate's speech to his or her constituent supporters (or, contributors to the non-publicly funded candidate). A candidate strives to satisfy and mollify his or her supporters whenever possible; the politician, after all, depends considerably on pleasing supporters in order to maintain the campaign's momentum and coherence. Candidates

[35] *See* Part III. B. 2 *infra.*

are loosely tethered, not bound, to the notions of political speech held by their supporters. Political committees, on the other hand, are bound to reify the political thoughts of their member-contributors. The political communication by political committees is circumscribed by the expectations and understandings of the associates. The organizers of independent political committees, as agents and unlike candidates, are tied by their commitments to their particular contributors. The candidate, however, is free to exercise his or her own judgment as to what is in his or her own best interests based on a broader constituency. (This explains the apprehension with which many candidates' organizations look on the activities of uncoordinated and uncontrollable independent committees, but this does not and cannot limit the right of these independent committees to make their contribution to the robust political debate in any way they and their associates choose.)

The above comparison highlights once again the factual reality, as well as constitutional reality following *Buckley* and *Republican National Committee*, that the rights of candidates and their supporters are distinct. In *Buckley*, the Court realized that candidates could be ambivalent toward the independent political forays of their supporters. The Court noted that "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." [36] Individuals, by associating in political committees, can express viewpoints that complement the positions of the favored candidate, or, they can express viewpoints which seek to influence or prod the candidate and the public. That individuals, through their political committees, hope for a candidate's election in no way means that their own speech is interchangeable with the candidate's. The Constitution entitles

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[36] *Buckley* v. *Valeo*, 424 U.S. at 47.

even mainstream individuals favoring mainstream candidates to communicate their separate, if sympathetic, views.

4. *Political Committees Cannot Wield the* Quid Pro Quo: *The Compelling Interest in Eliminating Corruption is Insufficient to Justify Section 9012(f)*

As elaborated in Part II above, the *Buckley* Court sustained FECA's contribution, though not expenditure, limits on the basis of the compelling governmental interest in protecting elections from the taint of corruption. The Court saw in contributions to candidates the real possibility of corrupting *quid pro quos*. Independent expenditures, the Court felt, could not pose the same *quid pro quo* problem.

Similarly, the anticorruption interest cannot support the prohibition against *independent* expenditures by political committees. Any attempted exaction of a *quid pro quo* by a political committee would of course totally eliminate the constitutional protection reserved under *Buckley* for expenditures that are *independent*. A *coordinated*, non-independent expenditure by a committee might harbor a *quid pro quo*, but no more so than an individual's expenditures might.[37] Coordinated expenditures, by individuals or committees, are treated like contributions;[38] such contributions to a publicly funded candidate are of course illegal, but are inapposite to the constitutional issue here under consideration.

It is difficult, then, to imagine how the thousands of "small voices" associated together in a political commit-

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[37] In fact, the large-scale operation of a political committee, requiring registration with the FEC, would be less capable of keeping a *quid pro quo* secret than could a wealthy individual operating without the bright sunshine of public scrutiny.

[38] *See* notes 7-9, 29 & accompanying text *supra*.

tee could compromise a candidate for President. The political committees are venting the political ideas and commitments of their members, not of the candidate. The candidate will no more be beholden to the political committees than Presidents typically are to those elements of their constituency who voted for them. It is individuals themselves, acting in association, who are addressing political issues through independent expenditures. This public comment may persuade, and thereby influence decisionmakers, but it is protected by the First Amendment.[39]

A further check does now exist, however, on the power of political committees to finance the views of their members: contributions to committees are restricted in amount by 2 U.S.C. section 441a(a)(C). An individual may give only up to $5,000 to a political committee. This particular contribution limitation was not addressed directly in *Buckley*, but might be constitutionally permissible according to the *Buckley* rationale, which upheld other such limits.[40] What all of this clearly indicates is that while

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[39] *See Let's Help Florida* v. *McCrary*, 621 F.2d 195 (5th Cir. 1980).

[40] Contribution limits to political committees have been upheld in two recent cases. *See California Medical Association* v. *FEC*, No. 79-4426, slip op. (9th Cir. 23 May 1980); *Mott* v. *FEC*, No. 79-3375 (D.D.C. 30 June 1980). Congress could, perhaps, if these authorities are upheld, shrink reasonable limits on contributions as it might deem necessary to control further possibilities for corruption in the electoral process. We have no occasion here to express any view on the constitutionality of specific limitations on contributions to political committees. *But cf. California Medical Association* v. *FEC*, No. 79-4426, slip op. at 25-26 (9th Cir. 23 May 1980)

(Wallace, J., concurring and dissenting):

> Only in conjunction with outside donors will some unincorporated associations be able to aggregate sufficient funds and expertise to compete effectively in the political market place with other more affluent 'persons' capable of huge personal expenditures.

political committees may have the power to express sympathy and agreement with candidates, neither they nor individual members have the power to control the candidates they favor.

B. *Political Committees Have First Amendment Rights Commensurate With Individuals' Rights*

In the preceding section we demonstrated that the prohibition of section 9012(f) raises an *expenditure* question under *Buckley*, thereby implicating highly protected free speech rights. We also showed how political committees simply pool funds and channel the joint speech of their members. We now turn to consider directly the closely related question: whether political committees, as multi-person organizations, have First Amendment rights so inferior to those of individuals that they fall out from the protective aegis of *Buckley*?

1. Buckley *Comprehends First Amendment Rights for Groups*

It is absolutely plain that free speech rights protected under *Buckley* extend beyond individuals. The Court there overturned "substantial and direct restrictions on the ability of candidates, citizens, *and associations* to engage in protected political expression. . . ."[41]

Furthermore, the Supreme Court has also emphasized that free expression may not be limited on the basis of the "identity of its source, whether corporation, *association*, union or individual."[42] As a "political committee"

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[41] 424 U.S. at 58-59 (emphasis added). The Court also wrote: "It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, *groups*, and candidates." *Id.* at 39 (emphasis added).

[42] *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 (1978) (emphasis added).

is defined in 26 U.S.C. section 9012(9) as "any committee, association or organization" which receives contributions or make expenditures for the purpose of influencing a candidate's election, it should fall under the same general protection reserved for groups and associations wishing to communicate their interests to the public. The fact of receipt of contributions (to finance expenditures) does not distinguish political committees from any other association which takes an active position on a candidate. Likewise, a political committee is no different under the First Amendment from a wealthy individual who may, it has been decided, lawfully dedicate his entire fortune to make independent expenditures paying for the same public communications, *e.g.*, television, magazine, newspaper, billboard advertisements, *etc.*, which the committee would undertake. Individuals—wealthy or otherwise—groups and associations, and political committees all engage in the same speech activities. In all cases the speech is meant to express active support for or opposition to a particular candidacy; *i.e.*, to express affiliation with and approval for the ideas of that candidate, or the reverse. This active support or opposition is buttressed by the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." [43]

2. *Freedom of Association Requires That Individuals Be Allowed to Join in Political Committees*

If section 9012(f) were not struck down, individuals of modest means would have no right to join with others to state their views to the public with some force. This

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[43] *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964).

We note that the election law exempts press organizations, 26 U.S.C. § 9012(f)(2)(A), and tax-exempt "section 501(c)" organizations, *id.* § 9012(f)(2)(B), from the limitations applicable to political committees. This discrimination against political committees along with the discrimination in favor of wealthy individuals is without constitutional foundation.

right of association is crucial under the Constitution and recognized in *Buckley*. We believe what the *Buckley* Court said about FECA's contribution and expenditure limits is dispositive here on the right of individuals to join political committees and thereby amplify their ability to speak publicly on matters of political concern. The Court said:

> The Act's contribution and expenditure limitations also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. The Act's contribution ceilings thus limit one important means of associating with a candidate or committee, *but leave the contributor free to become a member of any political association and* to assist personally in the association's efforts on behalf of candidates. And the Act's contribution limitations permit associations and candidates to aggregate large sums of money to promote effective advocacy. By contrast, the Act's $1,000 limitation on independent expenditures "relative to a clearly identified candidate" precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association. See *NAACP* v. *Alabama*, 357 U.S. at 460. The Act's constraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression "is simultaneously an interference with the freedom of [their] adherents," *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion). See *Cousins* v. *Wigoda*, 419 U.S., at 487-488; *NAACP* v. *Button*, 371 U.S. 415, 431 (1963).[44]

[44] *Buckley* v. *Valeo*, 424 U.S. at 22-23 (emphasis added).

Politics is, after all, the unifying theme among members of political committees; their associational tie is the desire to affirm publicly their political viewpoint held in common. The organizers of political committees really only mobilize existing political sentiment looking for an outlet—the small size of contributions freely given by diverse contributors expecting no personal glory or prospects of hobnobbing with celebrities attests to that. This phenomenon of the so-called political committees *is* the right of association to express political views together with others, and thereby impress the public. An independent association dedicated to effective political expression which was not in essence a "political committee" would be either an exempted organization,[45] or terribly quaint. The Constitution protects potent political voices along with the more effete ones; the First Amendment ensures both that persons may speak, and that they may speak together.

C. *Conclusion—Section 9012(f) Violates the First Amendment*

Given our holdings that section 9012(f) is an expenditure restriction, and is, therefore, a powerful inhibition on political speech, we must strike down that section as it fails to survive the strict scrutiny required by the First Amendment. The compelling governmental interest to fight electoral corruption is insufficient, here as in *Buckley*, to justify what amounts to a direct limitation on political speech. Whereas a presidential candidate by accepting public funds may choose for him or herself to do without unlimited contributions and expenditures, the candidate's public supporters have a separate, protected right to express themselves, individually or jointly. This preserves free access and full participation in the public debate.

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[45] *See* note 43 *supra*.

IV. COMMON CAUSE SUIT DISMISSED AS MOOT

In Count I of its lawsuit Common Cause sued for injunctive and declaratory relief to the effect that section 9012(f) applied to the defendant political committees and prohibited their proposed expenditures. This involves the same issue as in the action brought by the FEC, herein resolved against the FEC. Consequently, as in our 28 August 1980 Order, we dismiss Count I of Common Cause's action as mooted pursuant to our decision in the FEC action. We express no opinion whether Common Cause possessed the requisite Article III characteristics to press Count I of its lawsuit before this court.

V. COMMON CAUSE MAY NOT SUE *TO ENFORCE* THE ELECTION LAWS

Count II of the Common Cause complaint does not implicate section 9012(f)'s prohibitions against independent expenditures. Rather, the theory of Count II is "that the defendant committees are not in fact independent of Ronald Reagan and his authorized committees. The violations of the Fund Act that Count II alleges are violations that result from, and are premised upon, coordination and concerted action between defendant committees and the Regan campaign." [46] We understand Count II to be an impermissible attempt by Common Cause, a private plaintiff, to enforce the Fund Act. We are without subject-matter jurisdiction under section 9011(b) to hear this claim.[47] The FEC is charged by statute with exclu-

[46] Plaintiffs' Opening Brief on the Merits at 50.

[47] Whether a single-judge district court would have jurisdiction under 28 U.S.C. § 1331 (1976) (federal question jurisdiction) is not before this court. Our holding dismissing Count II does not require explicit consideration of the Article III "case or controversy" requirement. As we find ourselves without subject-matter jurisdiction we leave open the question of Common Causes's standing to bring Count II of its complaint.

sive enforcement jurisdiction of the election laws, and moreover, the alleged illegal coordination would violate Fund Act provisions only with respect to *candidates*, not the defendant political committees; therefore, we hold also that Count II fails to state a claim upon which relief can be granted.

A. *No Subject-Matter Jurisdiction to Hear a Coordination Claim*

Section 9011(b) of the Fund Act grants jurisdiction to three-judge district courts of the United States to entertain actions "to implement or construe" provisions of the Fund Act whether or not the plaintiff has exhausted administrative or other remedies.[48]

Count II, though, raises complicated questions of fact and difficult questions of election law policy which are without the scope of "implement or construe." It would be incongruous and cumbersome for a three-judge court, ordered by Congress to expedite its consideration,[49] to supervise extensive discovery and receive detailed factual evidence. This fact-finding, of course, is prerequisite to—and pertains only to—a determination of *compliance* with the election laws. A compliance issue is not one properly before a three-judge court charged with implementation and construction of a congressional act; and, an expedited judgment on compliance is not appropriate to a nonexpert three-judge court evaluating in the first instance circumstances surrounding an election controversy.

Congress ordered expedition in judicial review under section 9011(b) because elections come up fast and candidates, whoever they turn out to be, and others, need to know whether and how the election laws apply, and how

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[48] 26 U.S.C. § 9011(b)(1)&(2) (1976).

[49] 26 U.S.C. § 9011(b)(2) (1976).

much they provide.[50] So that elections run smoothly, Congress has provided only that three-judge courts (with direct appeal to the Supreme Court) shall: quickly construe doubtful (or, dubious) sections of the Fund Act, and/or quickly implement the Act's funding mechanism for the benefit of entitled candidates.

Three-judge district courts are convened typically in order to judge a statute's constitutionality on its face, or to clarify a statute's meaning and application pursuant to standard judicial statutory construction. Three-judge district courts were used in *Buckley* and *Republican National Committee* as a forum for constitutional challenges to the Fund Act.[51] In short, we view the section 9011(b) jurisdiction of this court narrowly. The narrow view is inherent in "implement or construe," by which we understand Congress to have limited the competence of this court to questions of fundamental statutory interpretation and to pressing pre-election questions of uncertainty regarding funds allocable to candidates.[52] Questions of Fund Act violations that require elaborate investigation of unique factual situations are not proper subjects for this court.

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[50] *See* S. CONF. REP. NO. 92-533, 92d Cong., 1st Sess. 53-54 (1971); 117 CONG. REC. H. 12, 119 (9 Dec. 1971).

[51] *See also Jones* v. *Branigin*, 433 F.2d 576 (6th Cir. 1970), *cert. denied*, 401 U.S. 977 (1971) (substantial constitutional question prerequisite to convening of three-judge district court). All precedents are in accord supporting the proposition that three-judge district courts are extraordinary legal forums which are convened only to hear cases of special public interest.

[52] The time-sensitivity of a candidate's—and others'—need to know about available funds explains § 9011(b)'s provision of jurisdiction notwithstanding any exhaustion of administrative remedies.

B. *FEC Has Exclusive Enforcement Jurisdiction*

Congress has legislated in no uncertain terms with respect to FEC dominion over the election law. Section 437c(b)(1) of FECA reads:

> The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and Chapter 95 and Chapter 96 of Title 26 [*i.e.*, the Fund Act]. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.[53]

Since we view Count II as clearly an enforcement action, an action to ensure compliance with various provisions of the Fund Act, we must hold that FECA's section 437c(b)(1) precludes any consideration of alleged coordination of expenditures as pressed by Common Cause before this court.

The FEC itself adjudges Count II of the Common Cause complaint as an action to enforce the election laws.[54] The FEC which was allowed to intervene in the Common Cause action moved to dismiss Common Cause's complaint for lack of subject-matter jurisdiction.

The FEC's position on its enforcement jurisdiction has recently been vindicated by a panel of the Court of

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[53] 2 U.S.C. § 437c(b)(1), as amended by Pub. L. No. 96-187, § 306(b)(1), 93 Stat. 1355 (1979).

[54] FEC Motion to Dismiss at 11 & n.8. The FEC contended in footnote 8 that its "suit clearly differs from Common Cause's suit as the Commission's suit does not seek enforcement of the Act," rather, it "seek[s] only [a] declaratory judgment of the construction and constitutionality of 26 U.S.C. § 9012(f) pursuant to 26 U.S.C. § 9011(b)." In text the FEC wrote that Common Cause was simply "bring[ing] an enforcement action in the guise of a suit to implement or construe the statute."

Appeals for this circuit.[55] That court held that violations of the election laws[56] must first be brought before the FEC as within that agency's exclusive jurisdiction. The *Carter-Mondale* holding that the FEC has exclusive jurisdiction with respect to alleged campaign violations and noncompliance controls here.[57]

C. *Alleged Violations in Count II Do Not Apply to Political Committees*

Common Cause alleges in Count II that the defendant committees' proposed expenditures will violate sections 9003(b)(1), 9003(b)(2), 9012(a)(1), and 9012(b)(1) of the Fund Act. These provisions apply to presidential candidates who receive federal funding and must, therefore, limit their own expenditures and forgo private contributions.[58] Each of these sections can be violated only

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[55] *Carter-Mondale Reelection Committee, Inc.* v. *Federal Election Commission*, Nos. 80-1841 & 80-1842, slip op. (D.C. Cir. 12 Sept. 1980).

[56] The alleged violations in *Carter-Mondale* involved the same issues of coordination between political committees and the official Reagan campaign that are the substance of Common Cause's Count II. *See id.* at 8.

[57] "Exclusive jurisdiction," held the court, was especially powerful in the election law context. The law "provides for FEC enforcement through both informal consent proceedings and formal proceedings." *Id.* at 11. An FEC investigation may completely absolve the challenged conduct, or may result in a partial vindication resolved by a consent decree. The intrusion of massive discovery requests by a private party, like Common Cause, would plainly upset the delicate balance in the structure of campaign regulation. Common Cause would unsettle the coherent administration of election law policy and practice if allowed to go forward with Count II of its complaint.

[58] Candidates may not restrict the individual rights of their supporters as a result of the choice to accept public funding. *See* notes 30-32 & accompanying text *supra*.

by *the candidate* receiving federal funds. Thus Count II does not state a claim alleging a violation of the Fund Act by the defendant political committees. This also confirms the impropriety of permitting a private party to enforce the election laws at its own discretion. For these reasons we dismiss Count II also for failure to state a claim upon which relief can be granted.

CONCLUSION

Consistent with our Orders of 28 August 1980, we deny the FEC's motion for summary judgment and grant summary judgment for the defendant political committees and individuals on the grounds that section 9012(f) violates the Constitution. We dismiss Count I of the complaint brought by Common Cause as moot; Count II is dismissed for lack of subject-matter jurisdiction and for failure to state a claim.

So ordered.

/s/ Edward A. Tamm
EDWARD A. TAMM
Circuit Judge

/s/ Malcolm Richard Wilkey
MALCOLM RICHARD WILKEY
Circuit Judge

/s/ John Garrett Penn
JOHN GARRETT PENN
District Judge

September 30, 1980

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. 80-1609

Three-Judge Court

COMMON CAUSE, *et al.*,
Plaintiffs

v.

HARRISON SCHMITT, *et al.*,
Defendants

ORDER

The Court, having before it the pleadings, motions, affidavits, and briefs of the parties and amici curiae, heard oral argument on August 19, 1980. Because of the nature of the case the Court is of the view that the decision, like the briefing and argument, should be expedited, with opinion or opinions to follow.

It is therefore ORDERED

1. That the motion of Common Cause, et al. to consolidate this action with C.A. 80-1754 is DENIED.
2. That Count I of Plaintiffs' Amended Complaint is DISMISSED on the basis of the Court's decision in C.A. 80-1754, *Federal Election Commission* v. *Americans for Change, et al.*
3. That Count II of Plaintiff's Amended Complaint is DISMISSED for lack of jurisdiction of the subject matter and for failure to state a claim. Defendants' motions to that effect are hereby GRANTED.
4. That defendants' motions for protective orders are DENIED as MOOT.

5. That all other pending motions by all parties are DENIED.

/s/ Edward A. Tamm
EDWARD A. TAMM
Circuit Judge

/s/ Malcolm Richard Wilkey
MALCOLM RICHARD WILKEY
Circuit Judge

/s/ John Garrett Penn
JOHN GARRETT PENN
District Judge

August 28, 1980

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

C.A. 80-1754

Three-Judge Court

FEDERAL ELECTION COMMISSION,
Plaintiff

v.

AMERICANS FOR CHANGE, *et al.*,
Defendants

ORDER

The Court, having before it the pleadings, motions, affidavits, and briefs of the parties and amici curiae, heard oral argument on August 19, 1980. Because of the nature of the case the Court is of the view that the decision, like the briefing and argument, should be expedited, with opinion or opinions to follow.

It is therefore ORDERED

1. That the motion of the American Civil Liberties Union Fund of the National Capital Area for leave to participate as Amicus Curiae is GRANTED.
2. That the motion of Common Cause to intervene is DENIED.
3. That the motion of the Plaintiff Federal Election Commission for Summary Judgment is DENIED.
4. That the motions of the Defendants Americans for Change, Americans for an Effective Presidency, and Fund for a Conservative Majority for Summary Judgment are GRANTED.

5. That all other pending motions by all parties are DENIED.

/s/ Edward A. Tamm
EDWARD A. TAMM
Circuit Judge

/s/ Malcolm Richard Wilkey
MALCOLM RICHARD WILKEY
Circuit Judge

/s/ John Garrett Penn
JOHN GARRETT PENN
District Judge

August 28, 1980

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1609

COMMON CAUSE, DAVID COHEN, WINIFRED LONG
Plaintiffs,

v.

HARRISON SCHMITT, *et al.*
Defendants.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that plaintiffs Common Cause, David Cohen and Winifred Long appeal to the Supreme Court of the United States from the final order entered in this action on August 28, 1980, dismissing plaintiffs' Amended Complaint.

This appeal is taken pursuant to 26 U.S.C. § 9011(b)(2), 28 U.S.C. § 1252, and 28 U.S.C. § 1253.

/s/ Michael L. Burack
MICHAEL L. BURACK

Wilmer & Pickering
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

One of Counsel for Plaintiffs

September 26, 1980

[Certificate of Service omitted in printing]

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1754

FEDERAL ELECTION COMMISSION
Plaintiff,

v.

AMERICANS FOR CHANGE, *et al.*,
Defendants.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Common Cause, David Cohen and Winifred Long appeal to the Supreme Court of the United States from the final order entered in this action on August 28, 1980, denying their motion to intervene in this action.

This appeal is taken pursuant to 26 U.S.C. § 9011(b)(2), 28 U.S.C. § 1252, and 28 U.S.C. § 1253.

/s/ Michael L. Burack
MICHAEL L. BURACK
Wilmer & Pickering
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

One of Counsel for Common Cause, David Cohen and Winifred Long

September 26, 1980

[Certificate of Service omitted in printing]

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CA 80-1609

Three-Judge Court

COMMON CAUSE, *et al.*,
Plaintiffs

v.

HARRISON SCHMITT, *et al.*,
Defendants

FEDERAL ELECTION COMMISSION,
Intervenor

CA 80-1754

Three-Judge Court

FEDERAL ELECTION COMMISSION,
Plaintiff

v.

AMERICANS FOR CHANGE, *et al.*,
Defendants

ORDER

The Court hereby orders that the above cases be consolidated.

EDWARD A. TAMM
Circuit Judge

/s/ Malcolm Richard Wilkey
MALCOLM RICHARD WILKEY
Circuit Judge

/s/ John Garrett Penn
JOHN GARRETT PENN
District Judge

September 24, 1980

[Filed September 25, 1980]

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CA 80-1609 (Consolidated)

Three-Judge Court

COMMON CAUSE, *et al.*,
Plaintiffs

v.

HARRISON SCHMITT, *et al.*,
Defendants

FEDERAL ELECTION COMMISSION,
Intervenor

CA 80-1754

Three-Judge Court

FEDERAL ELECTION COMMISSION,
Plaintiff

v.

AMERICANS FOR CHANGE, *et al.*,
Defendants

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Common Cause, David Cohen and Winifred Long, plaintiffs in No. 80-1609 and intervenor-applicants in No. 80-1754, appeal to the Supreme Court of the United States from the orders, entered in these consolidated actions on August 28, 1980,

that (1) dismissed their Amended Complaint in No. 80-1609, (2) denied their motion to intervene in No. 80-1754, and (3) denied the motion of the Federal Election Commission for summary judgment and granted the motions of the defendants for summary judgment in No. 80-1754.

We are filing this Amended Notice as a result of the Order dated September 25, 1980 (which we received on September 27, 1980), consolidating these two cases and the Opinion dated September 30, 1980 (which we received on October 3, 1980).

This appeal is taken pursuant to 26 U.S.C. § 9011 (b) (2), 28 U.S.C. § 1252, and 28 U.S.C. § 1253.

/s/ Michael L. Burack
MICHAEL L. BURACK
Wilmer & Pickering
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

One of Counsel for Common Cause, David Cohen and Winifred Long

October 3, 1980

[Certificate of Service omitted in printing]

APPENDIX H

THE PRESIDENTIAL ELECTION CAMPAIGN FUND ACT, 26 U.S.C. CH. 95

26 U.S.C. § 9001. Short title

This chapter may be cited as the "Presidential Election Campaign Fund Act."

26 U.S.C. § 9002. Definitions

For purposes of this chapter—

(1) The term "authorized committee" means, with respect to the candidates of a political party for President and Vice President of the United States, any political committee which is authorized in writing by such candidates to incur expenses to further the election of such candidates. Such authorization shall be addressed to the chairman of such political committee, and a copy of such authorization shall be filed by such candidates with the Commission. Any withdrawal of any authorization shall also be in writing and shall be addressed and filed in the same manner as the authorization.

(2) The term "candidate" means with respect to any presidential election, an individual who—

(A) has been nominated for election to the office of President of the United States or the office of Vice President of the United States by a major party, or

(B) has qualified to have his name on the election ballot (or to have the names of electors pledged to him on the election ballot) as the candidate of a political party for election to either such office in 10 or more States.

For purposes of paragraphs (6) and (7) of this section and purposes of section 9004(a)(2), the term "candidate" means, with respect to any preceding presidential election, an individual who received popular votes for the office of President in such election. The term "candidate" shall not include any individual who has ceased actively to seek election to the office of President of the United States or to the office of Vice President of the United States, in more than one State.

(3) The term "Commission" means the Federal Election Commission established by section 309(a)(1) of the Federal Election Campaign Act of 1971 [section 437c(a)(1) of title 2].

(4) The term "eligible candidates" means the candidates of a political party for President and Vice President of the United States who have met all applicable conditions for eligibility to receive payments under this chapter set forth in section 9003.

(5) The term "fund" means the Presidential Election Campaign Fund established by section 9006(a).

(6) The term "major party" means, with respect to any presidential election, a political party whose candidate for the office of President in the preceding presidential election received, as the candidate of such party, 25 percent or more of the total number of popular votes received by all candidates for such office.

(7) The term "minor party" means, with respect to any presidential election, a political party whose candidate for the office of President in the preceding presidential election received, as the candidate of such party, 5 percent or more but less than 25 percent of the total number of popular votes received by all candidates for such office.

(8) The term "new party" means with respect to any presidential election, a political party which is neither a major party nor a minor party.

(9) The term "political committee" means any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office.

(10) The term "presidential election" means the election of presidential and vice-presidential electors.

(11) The term "qualified campaign expense" means an expense—

(A) incurred—

(i) by the candidate of a political party for the office of President to further his election to such office or to further the election of the candidate of such political party for the office of Vice President, or both,

(ii) by the candidate of a political party for the office of Vice President to further his election to such office or to further the election of the candidate of such political party for the office of President, or both, or

(iii) by an authorized committee of the candidates of a political party for the offices of President and Vice President to further the election of either or both of such candidates to such offices,

(B) incurred within the expenditure report period (as defined in paragraph (12)), or incurred before the beginning of such period to

the extent such expense is for property, services, or facilities used during such period, and

(C) neither the incurring nor payment of which constitutes a violation of any law of the United States or of the State in which such expense is incurred or paid.

An expense shall be considered as incurred by a candidate or an authorized committee if it is incurred by a person authorized by such candidate or such committee, as the case may be, to incur such expense on behalf of such candidate or such committee. If an authorized committee of the candidates of a political party for President and Vice President of the United States also incurs expenses to further the election of one or more other individuals to Federal, State, or local elective public office, expenses incurred by such committee which are not specifically to further the election of such other individual or individuals shall be considered as incurred to further the election of such candidates for President and Vice President in such proportion as the Commission prescribes by rules or regulations.

(12) The term "expenditure report period" with respect to any presidential election means—

(A) in the case of a major party, the period beginning with the first day of September before the election, or, if earlier, with the date on which such major party at its national convention nominated its candidate for election to the office of President of the United States, and ending 30 days after the date of the presidential election; and

(B) in the case of a party which is not a major party, the same period as the expenditure report period of the major party which has the

shortest expenditure report period for such presidential election under subparagraph (A).

26 U.S.C. § 9003. Condition for eligibility for payments

(a) *In general.* In order to be eligible to receive any payments under section 9006, the candidates of a political party in a presidential election shall, in writing—

(1) agree to obtain and furnish to the Commission such evidence as it may request of the qualified campaign expenses of such candidates,

(2) agree to keep and furnish to the Commission such records, books, and other information as it may request, and

(3) agree to an audit and examination by the Commission under section 9007 and to pay any amounts required to be paid under such section.

(b) *Major parties.* In order to be eligible to receive any payments under section 9006, the candidates of a major party in a presidential election shall certify to the Commission, under penalty of perjury, that—

(1) such candidates and their authorized committees will not incur qualified campaign expenses in excess of the aggregate payments to which they will be entitled under section 9004, and

(2) no contributions to defray qualified campaign expenses have been or will be accepted by such candidates or any of their authorized committees except to the extent necessary to make up any deficiency in payments received out of the fund on account of the application of section 9006(d), and no contributions to defray expenses which would be qualified campaign expenses but for subparagraph (C) of section 9002(11) have been or will be accepted by such candidate or any of their authorized committees.

Such certification shall be made within such time prior to the day of the presidential election as the Commission shall prescribe by rules or regulations.

(c) *Minor and new parties.* In order to be eligible to receive any payments under section 9006, the candidates of a minor or new party in a presidential election shall certify to the Commission under penalty of perjury, that—

(1) such candidates and their authorized committees will not incur qualified campaign expenses in excess of the aggregate payments to which the eligible candidates of a major party are entitled under section 9004, and

(2) such candidates and their authorized committees will accept and expend or retain contributions to defray qualified campaign expenses only to the extent that the qualified campaign expenses incurred by such candidates and their authorized committees certified to under paragraph (1) exceed the aggregate payments received by such candidates out of the fund pursuant to section 9006.

Such certification shall be made within such time prior to the day of the presidential election as the Commission shall prescribe by rules or regulations.

(d) *Withdrawal by candidate.* In any case in which an individual ceases to be a candidate as a result of the operation of the last sentence of section 9002(2), such individual—

(1) shall no longer be eligible to receive any payments under section 9006, except that such individual shall be eligible to receive payments under such section to defray qualified campaign expenses incurred while actively seeking election to the office of President of the United States or to the office of

Vice President of the United States in more than one State; and

(2) shall pay to the Secretary, as soon as practicable after the date upon which such individual ceases to be a candidate, an amount equal to the amount of payments received by such individual under section 9006 which are not used to defray qualified campaign expenses.

26 U.S.C. § 9004. Entitlement of eligible candidates to payments

(a) *In general.* Subject to the provisions of this chapter—

(1) The eligible candidates of each major party in presidential election shall be entitled to equal payments under section 9006 in an amount which, in the aggregate, shall not exceed the expenditure limitations applicable to such candidates under section 441a(b)(1)(B) of title 2.

(2) (A) The eligible candidates of a minor party in a presidential election shall be entitled to payments under section 9006 equal in the aggregate to an amount which bears the same ratio to the amount allowed under paragraph (1) for a major party as the number of popular votes received by the candidate for President of the minor party, as such candidate, in the preceding presidential election bears to the average number of popular votes received by the candidates for President of the major parties in the preceding presidential election.

(B) If the candidate of one or more political parties (not including a major party) for the office of President was a candidate for such office in the preceding presidential election and received

5 percent or more but less than 25 percent of the total number of popular votes received by all candidates for such office, such candidate and his running mate for the office of Vice President, upon compliance with the provisions of section 9003(a) and (c), shall be treated as eligible candidates entitled to payments under section 9006 in an amount computed as provided in subparagraph (A) by taking into account all the popular votes received by such candidate for the office of President in the preceding presidential election. If eligible candidates of a minor party are entitled to payments under this subparagraph, such entitlement shall be reduced by the amount of the entitlement allowed under subparagraph (A).

(3) The eligible candidates of a minor party or a new party in a presidential election whose candidate for President in such election receives, as such candidate, 5 percent or more of the total number of popular votes cast for the office of President in such election shall be entitled to payments under section 9006 equal in the aggregate to an amount which bears the same ratio to the amount allowed under paragraph (1) for a major party as the number of popular votes received by such candidate in such election bears to the average number of popular votes received in such election by the candidates for President of the major parties. In the case of eligible candidates entitled to payments under paragraph (2), the amount allowable under this paragraph shall be limited to the amount, if any, by which the entitlement under the preceding sentence exceeds the amount of the entitlement under paragraph (2).

(b) *Limitations.* The aggregate payments to which the eligible candidates of a political party shall be entitled under subsections (a)(2) and (3) with respect

to a presidential election shall not exceed an amount equal to the lower of—

(1) the amount of qualified campaign expenses incurred by such eligible candidates and their authorized committees, reduced by the amount of contributions to defray qualified campaign expenses received and expended or retained by such eligible candidates and such committees, or

(2) the aggregate payments to which the eligible candidates of a major party are entitled under subsection (a)(1), reduced by the amount of contributions described in paragraph (1) of this subsection.

(c) *Restrictions.* The eligible candidates of a political party shall be entitled to payments under subsection (a) only—

(1) to defray qualified campaign expenses incurred by such eligible candidates or their authorized committees, or

(2) to repay loans the proceeds of which were used to defray such qualified campaign expenses, or otherwise to restore funds (other than contributions to defray qualified campaign expenses received and expended by such candidates or such committees) used to defray such qualified campaign expenses.

(d) *Expenditures from personal funds.* In order to be eligible to receive any payment under section 9006, the candidate of a major, minor, or new party in an election for the office of President shall certify to the Commission, under penalty of perjury, that such candidate will not knowingly make expenditures from his personal funds, or the personal funds of his immediate family, in connection with his campaign for election to the office of President in excess of, in the aggregate, $50,000. For purposes of this subsection, expenditures from personal funds made by a candidate of a major, minor, or new

party for the office of Vice President shall be considered to be expenditures by the candidate of such party for the office of President.

(e) *Definition of immediate family.* For purposes of subsection (d), the term "immediate family" means a candidate's spouse, and any child, parent, grandparent, brother, half-brother, sister, or half-sister of the candidate, and the spouses of such persons.

26 U.S.C. § 9005. Certification by Commission

(a) *Initial certifications.* Not later than 10 days after the candidates of a political party for President and Vice President of the United States have met all applicable conditions for eligibility to receive payments under this chapter set forth in section 9003, the Commission shall certify to the Secretary of the Treasury for payment to such eligible candidates under section 9006 payment in full of amounts to which such candidates are entitled under section 9004.

(b) *Finality of certifications and determinations.* Initial certifications by the Commission under subsection (a), and all determinations made by it under this chapter, shall be final and conclusive, except to the extent that they are subject to examination and audit by the Commission under section 9007 and judicial review under section 9011.

26 U.S.C. § 9006. Payments to eligible candidates

(a) *Establishment of campaign fund.* There is hereby established on the books of the Treasury of the United States a special fund to be known as the "Presidential Election Campaign Fund." The Secretary of the Treasury shall, from time to time, transfer to the fund an amount not in excess of the sum of the amounts designated (subsequent to the previous Presidential election) to the fund by individuals under section 6096. There is appropriated to the fund for each fiscal year, out of amounts in the general fund of the Treasury not other-

wise appropriated, an amount equal to the amounts so designated during each fiscal year, which shall remain available to the fund without fiscal year limitation.

(b) *Payments from the fund.* Upon receipt of a certification from the Commission under section 9005 for payment to the eligible candidates of a political party, the Secretary of the Treasury shall pay to such candidates out of the fund the amount certified by the Commission. Amounts paid to any such candidates shall be under the control of such candidates.

(c) *Insufficient amounts in fund.* If at the time of a certification by the Commission under section 9005 for payment to the eligible candidates of a political party, the Secretary determines that the moneys in the fund are not, or may not be, sufficient to satisfy the full entitlements of the eligible candidates of all political parties, he shall withhold from such payment such amount as he determines to be necessary to assure that the eligible candidates of each political party will receive their pro rata share of their full entitlement. Amounts withheld by reason of the preceding sentence shall be paid when the Secretary determines that there are sufficient moneys in the fund to pay such amounts, or portions thereof, to all eligible candidates from whom amounts have been withheld, but, if there are not sufficient moneys in the fund to satisfy the full entitlement of the eligible candidates of all political parties, the amounts so withheld shall be paid in such manner that the eligible candidates of each political party receive their pro rata share of their full entitlement. In any case in which the Secretary determines that there are insufficient moneys in the fund to make payments under subsection (b), section 9008 (b) (3), and section 9037(b), moneys shall not be made available from any other source for the purpose of making such payments.

26 U.S.C. § 9007. Examinations and audits; repayments

(a) *Examinations and audits.* After each presidential election, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of the candidates of each political party for President and Vice President.

(b) *Repayments.*

(1) If the Commission determines that any portion of the payments made to the eligible candidates of a political party under section 9006 was in excess of the aggregate payments to which candidates were entitled under section 9004, it shall so notify such candidates, and such candidates shall pay to the Secretary of the Treasury an amount equal to such portion.

(2) If the Commission determines that the eligible candidates of a political party and their authorized committees incurred qualified campaign expenses in excess of the aggregate payments to which the eligible candidates of a major party were entitled under section 9004, it shall notify such candidates of the amount of such excess and such candidates shall pay to the Secretary of the Treasury an amount equal to such amount.

(3) If the Commission determines that the eligible candidates of a major party or any authorized committee of such candidates accepted contributions (other than contributions to make up deficiencies in payments out of the fund on account of the application of section 9006(c)) to defray qualified campaign expenses (other than qualified campaign expenses with respect to which payment is required under paragraph (2)), it shall notify such candidates of the amount of the contributions so accepted, and such candidates shall pay to the Secretary of the Treasury an amount equal to such amount.

(4) If the Commission determines that any amount of any payment made to the eligible candidates of a political party under section 9006 was used for any purpose other than—

(A) to defray the qualified campaign expenses with respect to which such payment was made, or

(B) to repay loans the proceeds of which were used, or otherwise to restore funds (other than contributions to defray qualified campaign expenses which were received and expended) which were used to defray such qualified campaign expenses,

it shall notify such candidates of the amount so used, and such candidates shall pay to the Secretary of the Treasury an amount equal to such amount.

(5) No payment shall be required from the eligible candidates of a political party under this subsection to the extent that such payment, when added to other payments required from such candidates under this subsection, exceeds the amount of payments received by such candidates under section 9006.

(c) *Notification.* No notification shall be made by the Commission under subsection (b) with respect to a presidential election more than 3 years after the day of such election.

(d) *Deposit of repayments.* All payments received by the Secretary of the Treasury under subsection (b) shall be deposited by him in the general fund of the Treasury.

26 U.S.C. § 9008. Papments for presidential nominating conventions.

(a) *Establishment of accounts.* The Secretary shall maintain in the fund, in addition to any account which he maintains under section 9006(a), a separate account for the national committee of each major party and minor

party. The Secretary shall deposit in each such account an amount equal to the amount which each such committee may receive under subsection (b). Such deposits shall be drawn from amounts designated by individuals under section 6096 and shall be made before any transfer is made to any account for any eligible candidate under section 9006(a).

(b) *Entitlement to payments from the fund.*

(1) *Major parties.* Subject to the provisions of this section, the national committee of a major party shall be entitled to payments under paragraph (3), with respect to any presidential nominating convention, in amounts which, in the aggregate, shall not exceed $3,000,000.

(2) *Minor parties.* Subject to the provisions of this section, the national committee of a minor party shall be entitled to payments under paragraph (3), with respect to any presidential nominating convention, in amounts which, in the aggregate, shall not exceed an amount which bears the same ratio to the amount the national committee of a major party is entitled to receive under paragraph (1) as the number of popular votes received by the candidate for President of the minor party, as such candidate, in the preceding presidential election bears to the average number of popular votes received by the candidates for President of the United States of the major parties in the preceding presidential election.

(3) *Payments.* Upon receipt of certification from the Commission under subsection (g), the Secretary shall make payments from the appropriate account maintained under subsection (a) to the national committee of a major party or minor party which elects to receive its entitlement under this subsection. Such payments shall be available for use by such committee in accordance with the provisions of subsection (c).

(4) *Limitation.* Payments to the national committee of a major party or minor party under this subsection, from the account designated for such committee shall be limited to the amounts in such account at the time of payment.

(5) *Adjustment of entitlements.* The entitlements established by this subsection shall be adjusted in the same manner as expenditure limitations established by section 441a(b) and section 441a(d) of title 2, United States Code, are adjusted pursuant to the provisions of section 441a(c) of such title.

(c) *Use of funds.* No part of any payment made under subsection (b) shall be used to defray the expenses of any candidate or delegate who is participating in any presidential nominating convention. Such payments shall be used only—

(1) to defray expenses incurred with respect to a presidential nominating convention (including the payment of deposits) by or on behalf of the national committee receiving such payments; or

(2) to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds (other than contributions to defray such expenses received by such committee) used to defray such expenses.

(d) *Limitation of expenditures.*

(1) *Major parties.* Except as provided by paragraph (3), the national committee of a major party may not make expenditures with respect to a presidential nominating convention which, in the aggregate, exceed the amount of payments to which such committee is entitled under subsection (b)(1).

(2) *Minor parties.* Except as provided by paragraph (3), the national committee of a minor party may not make expenditures with respect to a presidential nominating convention which, in the aggre-

gate, exceed the amount of the entitlement of the national committee of a major party under subsection (b)(1).

(3) *Exception.* The Commission may authorize the national committee of a major party or minor party to make expenditures which, in the aggregate, exceed the limitation established by paragraph (1) or paragraph (2) of this subsection. Such authorization shall be based upon a determination by the Commission that, due to extraordinary and unforeseen circumstances, such expenditures are necessary to assure the effective operation of the presidential nominating convention by such committee.

(4) *Provision of legal or accounting services.* For purposes of this section, the payment, by any person other than the national committee of a political party (unless the person paying for such services is a person other than the regular employer of the individual rendering such services) of compensation to any individual for legal or accounting services rendered to or on behalf of the national committee of a political party shall not be treated as an expenditure made by or on behalf of such committee with respect to its limitations on presidential nominating convention expenses.

(e) *Availability of payments.* The national committee of a major party or minor party may receive payments under subsection (b)(3) beginning on July 1 of the calendar year immediately preceding the calendar year in which a presidential nominating convention of the political party involved is held.

(f) *Transfer to the fund.* If, after the close of a presidential nominating convention and after the national committee of the political party involved has been paid the amount which it is entitled to receive under this section, there are moneys remaining in the account of such

national committee, the Secretary shall transfer the moneys so remaining to the fund.

(g) *Certification by Commission.* Any major party or minor party may file a statement with the Commission in such form and manner and at such times as it may require, designating the national committee of such party. Such statement shall include the information required by section 433(b) of title 2, together with such additional information as the Commission may require. Upon receipt of a statement filed under the preceding sentences, the Commission promptly shall verify such statement according to such procedures and criteria as it may establish and shall certify to the Secretary for payment in full to any such committee of amounts to which such committee may be entitled under subsection (b). Such certifications shall be subject to an examination and audit which the Commission shall conduct no later than December 31 of the calendar year in which the presidential nominating convention involved is held.

(h) *Repayments.* The Commission shall have the same authority to require repayments from the national committee of a major party or a minor party as it has with respect to repayments from any eligible candidate under section 9007(b). The provisions of section 9007(c) and section 9007(d) shall apply with respect to any repayment required by the Commission under this subsection.

26 U.S.C. § 9009. Reports to Congress; regulations

(a) *Reports.* The Commission shall, as soon as practicable after each presidential election, submit a full report to the Senate and House of Representatives setting forth—

(1) the qualified campaign expenses (shown in such detail as the Commission determines necessary) incurred by the candidates of each political party and their authorized committees;

(2) the amounts certified by it under section 9005 for payment to the eligible candidates of each political party;

(3) the amount of payments, if any, required from such candidates under section 9007, and the reasons for each payment required;

(4) the expenses incurred by the national committee of a major party or minor party with respect to a presidential nominating convention;

(5) the amounts certified by it under section 9008(g) for payment to each such committee; and

(6) the amount of payments, if any, required from such committees under section 9008(h), and the reasons for each such payment.

Each report submitted pursuant to this section shall be printed as a Senate document.

(b) *Regulations, etc.* The Commission is authorized to prescribe such rules and regulations in accordance with the provisions of subsection (c), to conduct such examinations and audits (in addition to the examinations and audits required by section 9007(a)), to conduct such investigations, and to require the keeping and submission of such books, records, and information, as it deems necessary to carry out the functions and duties imposed on it by this chapter.

(c) *Review of regulations.*

(1) The Commission, before prescribing any rule or regulation under subsection (b), shall transmit a statement with respect to such rule or regulation to the Senate and to the House of Representatives, in accordance with the provisions of this subsection. Such statement shall set forth the proposed rule or

regulation and shall contain a detailed explanation and justification of such rule or regulation.

(2) If either such House does not, through appropriate action, disapprove the proposed rule or regulation set forth in such statement no later than 30 legislative days after receipt of such statement, then the Commission may prescribe such rule or regulation. Whenever a committee of the House of Representatives reports any resolution relating to any such rule or regulation, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to. The Commission may not prescribe any rule or regulation which is disapproved by either such House under this paragraph.

(3) For purposes of this subsection, the term "legislative days" does not include any calendar day on which both Houses of the Congress are not in session.

(4) For purposes of this subsection, the term "rule or regulation" means a provision or series of interrelated provisions stating a single separable rule of law.

26 U.S.C. § 9010. Participation by Commission in judicial proceedings

(a) *Appearance by counsel.* The Commission is authorized to appear in and defend against any action filed under section 9011, either by attorneys employed in its office or by counsel whom it may appoint without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and whose com-

pensation it may fix without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title.

(b) *Recovery of certain payments.* The Commission is authorized through attorneys and counsel described in subsection (a) to appear in the district courts of the United States to seek recovery of any amounts determined to be payable to the Secretary of the Treasury as a result of examination and audit made pursuant to section 9007.

(c) *Declaratory and injunctive relief.* The Commission is authorized through attorneys and counsel described in subsection (a) to petition the courts of the United States for declaratory or injunctive relief concerning any civil matter covered by the provisions of this subtitle or section 6096. Upon application of the Commission an action brought pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

(d) *Appeal.* The Commission is authorized on behalf of the United States to appeal from, and to petition the Supreme Court for certiorari to review, judgments or decrees entered with respect to actions in which it appears pursuant to the authority provided in this section.

26 U.S.C. § 9011. Judicial review

(a) *Review of certification, determination, or other action by the Commission.* Any certification, determination, or other action by the Commission made or taken pursuant to the provisions of this chapter shall be subject to review by the United States Court of Appeals for the District of Columbia upon petition filed in such Court

by any interested person. Any petition filed pursuant to this section shall be filed within thirty days after the certification, determination, or other action by the Commission for which review is sought.

(b) *Suits to implement chapter.*

(1) The Commission, the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or construe any provisions of this chapter.

(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subsection and shall exercise the same without regard to whether a person asserting rights under provisions of this subsection shall have exhausted any administrative or other remedies that may be provided at law. Such proceedings shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

26 U.S.C. § 9012. Criminal penalties

(a) *Excess expenses.*

(1) It shall be unlawful for an eligible candidate of a political party for President and Vice President in a presidential election or any of his authorized committees knowingly and willfully to incur qualified campaign expenses in excess of the aggregate pay-

ments to which the eligible candidates of a major party are entitled under section 9004 with respect to such election. It shall be unlawful for the national committee of a major party or minor party knowingly and willfully to incur expenses with respect to a presidential nominating convention in excess of the expenditure limitation applicable with respect to such committee under section 9008(d), unless the incurring of such expenses is authorized by the Commission under section 9008(d)(3).

(2) Any person who violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than one year, or both. In the case of a violation by an authorized committee, any officer or member of such committee who knowingly and willfully consents to such violation shall be fined not more than $5,000, or imprisoned not more than one year, or both.

(b) *Contributions.*

(1) It shall be unlawful for an eligible candidate of a major party in a presidential election or any of his authorized committees knowingly and willfully to accept any contribution to defray qualified campaign expenses, except to the extent necessary to make up any deficiency in payments received out of the fund on account of the application of section 9006(c), or to defray expenses which would be qualified campaign expenses but for subparagraph (C) of section 9002(11).

(2) It shall be unlawful for an eligible candidate of a political party (other than a major party) in a presidential election or any of his authorized committees knowingly and willfully to accept and expend or retain contributions to defray qualified campaign expenses in an amount which exceeds the qualified

campaign expenses incurred with respect to such election by such eligible candidate and his authorized committees.

(3) Any person who violates paragraph (1) or (2) shall be fined not more than $5,000, or imprisoned not more than one year, or both. In the case of a violation by an authorized committee, any officer or member of such committee who knowingly and willfully consents to such violation shall be fined not more than $5,000, or imprisoned not more than one year, or both.

(c) *Unlawful use of payments.*

(1) It shall be unlawful for any person who receives any payment under section 9006, or to whom any portion of any payment received under such section is transferred, knowingly and willfully to use, or authorize the use of, such payment or such portion for any purpose other than—

(A) to defray the qualified campaign expenses with respect to which such payment was made, or

(B) to repay loans the proceeds of which were used, or otherwise to restore funds (other than contributions to defray qualified campaign expenses which were received and expended) which were used, to defray such qualified campaign expenses.

(2) It shall be unlawful for the national committee of a major party or minor party which receives any payment under section 9008(b)(3) to use, or authorize the use of, such payment for any purpose other than a purpose authorized by section 9008(c).

(3) Any person who violates paragraph (1) shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(d) *False statements, etc.*

(1) It shall be unlawful for any person knowingly and willfully—

(A) to furnish any false, fictitious, or fraudulent evidence, books, or information to the Commission under this subtitle, or to include in any evidence, books, or information so furnished any misrepresentation of a material fact, or to falsify or conceal any evidence, books, or information relevant to a certification by the Commission or an examination and audit by the Commission under this chapter; or

(B) to fail to furnish to the Commission any records, books, or information requested by it for purposes of this chapter.

(2) Any person who violates paragraph (1) shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(e) *Kickback and illegal payments.*

(1) It shall be unlawful for any person knowingly and willfully to give or accept any kickback or any illegal payment in connection with any qualified campaign expense of eligible candidates or their authorized committees. It shall be unlawful for the national committee of a major party or minor party knowingly and willfully to give or accept any kickback or any illegal payment in connection with any expense incurred by such committee with respect to a presidential nominating convention.

(2) Any person who violates paragraph (1) shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(3) In addition to the penalty provided by paragraph (2), any person who accepts any kickback or

illegal payment in connection with any qualified campaign expense of eligible candidates or their authorized committees, or in connection with any expense incurred by the national committee of a major party or minor party with respect to a presidential nominating convention shall pay to the Secretary of the Treasury, for deposit in the general fund of the Treasury, an amount equal to 125 percent of the kickback or payment received.

(f) *Unauthorized expenditures and contributions.*

(1) Except as provided in paragraph (2), it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

(2) This subsection shall not apply to—

(A) expenditures by a broadcaster regulated by the Federal Communications Commission, or by a periodical publication, in reporting the news or in taking editorial positions, or

(B) expenditures by any organization described in section 501(c) of this title which is exempt from tax under section 501(a) of this title in communicating to its members the views of that organization.

(3) Any political committee which violates paragraph (1) shall be fined not more than $5,000, and any officer or member of such committee who knowingly and willfully consents to such violation and

any other individual who knowingly and willfully violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than one year, or both.

(g) *Unauthorized disclosure of information.*

(1) It shall be unlawful for any individual to disclose any information obtained under the provisions of this chapter except as may be required by law.

(2) Any person who violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than one year, or both.

26 U.S.C. § 9013. Effective date of chapter

The provisions of this chapter shall take effect on January 1, 1973.

* * * *

RELATED PROVISIONS OF THE FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED, 2 U.S.C. CH. 14

2 U.S.C. § 441a(b): *Dollar limits on expenditures by candidates for office of President of the United States.*

(1) No candidate for the office of President of the United States who is eligible under section 9003 of title 26 (relating to condition for eligibility for payments) or under section 9033 of title 26 relating to eligibility for payments) to receive payments from the Secretary of the Treasury may make expenditures in excess of—

(A) $10,000,000 in the case of a campaign for nomination for election to such office, except the aggregate of expenditures under this subparagraph in any one State shall not exceed the

greater of 16 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section), or $200,000; or

(B) $20,000,000 in the case of a campaign for election to such office.

(2) For purposes of this subsection—

(A) expenditures made by or on behalf of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be expenditures made by or on behalf of the candidate of such party for election to the office of President of the United States; and

(B) an expenditure is made on behalf of a candidate, including a vice presidential candidate, if it is made by—

(i) an authorized committee or any other agent of the candidate for purposes of making any expenditure; or

(ii) any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.

2 U.S.C. § 441a(c): *Increases on limits based on increases in price index.*

(1) At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the percent difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period. Each limitation established by sub-

section (b) of this section and subsection (d) of this section shall be increased by such percent difference. Each amount so increased shall be the amount in effect for such calendar year.

(2) For purposes of paragraph (1)—

(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means the calendar year of 1974.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 80-1609

COMMON CAUSE, a non-profit membership corporation
suing on behalf its members,
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1200

DAVID COHEN,
1322 Holly Street, N.W.
Washington, D.C. 20012
(202) 723-0707

WINIFRED LONG,
5043 Dana Place, N.W.
Washington, D.C. 20016
(202) 362-8319

Plaintiffs,

v.

HARRISON SCHMITT, in his capacity as Chairman
of Americans For Change,
338 8th Street, S.E.
Washington, D.C. 20003

CARL T. CURTIS, in his capacity as Treasurer
of Americans For Change,
6613 31st Place, N.W.
Washington, D.C. 20015

AMERICANS FOR CHANGE,
an unincorporated association,
218 N. Lee Street
Room 321
Alexandria, Virginia 22214

AMRICANS FOR AN EFFECTIVE PRESIDENCY,
an unincorporated association,
1225 19th Street, N.W.
Suite 415
Washington, D.C. 20036

FUND FOR A CONSERVATIVE MAJORITY,
an unincorporated association,
1022 Wilson Boulevard
Arlington, Virginia 22209
Defendants,

and

FEDERAL ELECTION COMMISSION,
an agency of the United States,
1325 K Street, N.W.
Washington, D.C. 20463
Intervenor-Defendant.

AMENDED COMPLAINT FOR ENTRY OF DECLARATORY AND INJUNCTIVE RELIEF BY A THREE-JUDGE DISTRICT COURT

Nature of the Case

1. This case arises under the Presidential Election Campaign Fund Act, Chapter 95 of Subtitle H of the Internal Revenue Code of 1954, 26 U.S.C. §§ 9001 *et seq.* ("Fund Act"). Under the Fund Act, a major party presidential candidate may receive federal funding to finance his campaign. In order to be eligible for federal funding, the candidate must certify that (1) he will not accept

private contributions to defray campaign expenses and (2) he and his campaign organizations will not incur expenses in excess of the amount of federal funds to which he is entitled. 26 U.S.C. §§ 9002(4), 9003(b). Once the candidate has become eligible for federal funding by so certifying, he must abide by these two conditions. *Id.* §§ 9012(a)(1), 9012(b)(1). Congress intended, by these provisions, to ensure that the campaign of a candidate who has elected to receive federal funding will in fact be financed out of federal funds, and not out of private funds raised on the side.

2. Congress foresaw, however, that this objective might be defeated by political committees that, although not expressly authorized by or formally coordinated with the candidate, solicit contributions and make expenditures on a large scale in support of a presidential candidate who has elected to receive federal financing and appear for all practical purposes to be an arm of the candidate's campaign. *See id.* § 9002(1). Accordingly, the Fund Act prohibits committees (but not individuals or informal groups of persons acting together directly on their own behalf) from incurring expenditures of more than $1,000 to further the election of a presidential candidate who has elected to receive federal funding. 26 U.S.C. § 9012(f)(1).

3. Ronald Reagan, the Republican Party's Presidential candidate, is virtually certain to elect to receive federal funding (in the amount of approximately $29,400,000) to finance his campaign. Defendants, purporting to act independently of the Reagan campaign, are seeking to raise, in the aggregate, between $26,000,000 and $48,000,000 in private contributions, which they plan to spend on professionally run campaigns to further Mr. Reagan's candidacy even if Mr. Reagan elects to receive federal funding. Defendants' actions will violate 26 U.S.C. § 9012(f)(1), and will also result

in the violation of 26 U.S.C. §§ 9012(a)(1) and 9012 (b)(1). Those actions will subvert the scheme enacted by Congress for the federal funding of presidential elections and have caused and will cause injury to plaintiffs. Plaintiffs ask this Court to declare defendants' actions to be unlawful and to enjoin them.

Jurisdiction and Venue

4. The Court has jurisdiction under 26 U.S.C. § 9011 (b) to entertain actions for declaratory and injunctive relief to implement or construe provisions of the Fund Act. That section provides that such actions may be brought by persons eligible to vote for President, without regard to whether other remedies have been exhausted. The Court also has jurisdiction under 28 U.S.C. § 1331, because the action arises under the laws of the United States and the amount in controversy exceeds $10,000 exclusive of interest and costs.

5. Venue in this Court is proper under 28 U.S.C. §§ 1391(b) and (c).

Three-Judge District Court

6. Convocation of a three-judge district court is required by 26 U.S.C. § 9011(b)(2), which provides that actions to implement or construe the Fund Act shall be heard and determined on an expedited basis by a three-judge district court in accordance with the procedures set forth in 28 U.S.C. § 2284.

The Parties

7. Plaintiff Common Cause is a non-profit membership corporation organized under the laws of the District of Columbia. Common Cause has approximately 225,000 dues-paying members in the fifty states and the District of Columbia. Common Cause is organized to promote,

on a nonpartisan basis, its members' interests in social welfare, civic betterment and social improvement in the United States by presenting its positions and those of its members to Congress, various agencies of the Executive Branch, and independent agencies of the Federal Government. Common Cause seeks to achieve these objectives by making government more responsive to the needs and demands of citizens through reform of the electoral process. The members of Common Cause include citizens of the United States who have been, are and intend to be registered voters for candidates for the office of President of the United States, contributors of lawful amounts of money to campaigns for the office of the President, and active participants in campaigns for the election of candidates for President. Common Cause and its members have a direct interest (1) in the integrity of an electoral process free from corruption or the appearance of corruption, (2) in ensuring that candidates for high public office are in fact accountable to their constituents, including plaintiffs, and (3) in ensuring compliance with laws enacted by Congress to preserve and protect these interests, including laws such as the Fund Act that restrict the flow of private money into presidential election campaigns.

8. Plaintiff David Cohen is a resident of and a registered voter in the District of Columbia. He is eligible to vote for President of the United States in 1980. He is the President and a member of Common Cause, and as such he shares the interests of Common Cause and its members set forth above. He is also a registered lobbyist on behalf of Common Cause, and as such he has been and intends to be actively involved in presenting his views and the views of Common Cause and its members to Congress, to various agencies of the Executive Branch and to independent agencies of the Federal Government.

9. Plaintiff Winifred Long is a resident of and a registered voter in the District of Columbia. She is eligible

to vote for President of the United States in 1980. She will vote for a presidential candidate other than Ronald Reagan in the 1980 presidential election. She has made lawful contributions of money to a presidential candidate other than Ronald Reagan.

10. Defendant Harrison Schmitt resides in the District of Columbia. He participated in the formation and organization of, and is the Chairman of, defendant Americans For Change. In that capacity, he is responsible for the operations, management and activities of defendant Americans For Change.

11. Defendant Carl T. Curtis resides in the District of Columbia. He participated in the formation and organization of, and is the Treasurer of, defendant Americans For Change. In that capacity, he is responsible for the operations, management and activities of defendant Americans For Change.

12. Defendant Americans For Change ("AFC") is an unincorporated association. It maintains some or all of its records and its bank account in the District of Columbia. It also holds meetings and press conferences and conducts some or all of its business in the District of Columbia. Defendant AFC registered as a "political committee" with the Federal Election Commission on or about May 23, 1980, and it is a "political committee" within the meaning of the Fund Act.

13. Defendant AFC is closely linked, through its organizers, officers and agents, to the Republican Party, the Republican National Committee and the Reagan Campaign Organization. For example:

a. Defendant Schmitt, the Chairman of AFC, is currently a member of the Republican National Committee Advisory Council on Economic Affairs and its subcommittee on inflation. He is also a delegate to the 1980 Republican National Convention and is pledged to vote for Ronald Reagan.

b. Stan Huckaby, the Assistant Treasurer and Custodian of Records of AFC, is currently the Treasurer of the 1980 Republican Unity Committee, which is an affiliated committee of the Reagan For President Committee. He is also a paid consultant of the Republican National Committee and maintains his office at the Republican National Committee headquarters in the District of Columbia.

c. James Edwards, a member of the AFC steering committee, is currently a member of the Republican National Committee Advisory Council on Natural Resources. He is also a delegate to the 1980 Republican National Convention and is pledged to vote for Ronald Reagan.

d. George Murphy, a member of the AFC steering committee, is currently a member of the Policy Board of the Republican National Committe Advisory Council on National Security and International Affairs.

e. Anna Chennault, a member of the AFC steering committee, is the Co-Chair of the Nationalities Division of the official Reagan For President campaign committee. She is currently a member of the Republican National Committee Advisory Committee on Fiscal Affairs and an ex-officio member of the Republican National Committee Executive Committee.

14. Defendant Americans For an Effective Presidency ("AFEP") is an unincorporated association. Its offices are in the District of Columbia. It holds press conferences and meetings and conducts business in the District of Columbia. Its media operations and staff activities are centered in the District of Columbia. Defendant AFEP registered as a "political committee" with the Federal Election Commission on or about July 9, 1980, and it is a "political committee" within the meaning of the Fund Act.

15. Defendant AFEP is closely linked, through its organizers, officers and agents, to the Republican Party, the Republican National Committee and past and present campaign organizations for Republican Party candidates. For example:

a. Peter Flanigan, the Chairman of AFEP, is a member of the Policy Board of the Republican National Committee's Advisory Council on Economic Affairs. He was the Deputy Campaign Chairman of the official 1968 general election campaign for the Republican Party candidate, Richard Nixon.

b. Stuart Spencer, who was involved in the organization of AFEP, is a full-time consultant to the official Reagan campaign. He was the national political director for the official 1976 general election campaign for the Republican Party candidate, Gerald Ford.

c. William Clements, who was involved in the organization of AFEP, is the Chairman of the official Reagan campaign in Texas. He is a member of the Republican National Committee's Advisory Council on National Security and International Affairs.

d. Thomas Reed, the Chairman of the Expenditures Committee of AFEP, was the Chairman of Ronald Reagan's 1970 gubernatorial re-election campaign and is a past member of the Republican National Committee.

e. Don Fierce, the Staff Director of AFEP, was a regional political director for the official 1976 general election campaign for the Republican Party candidate, Gerald Ford. He has also managed numerous other official Republican campaigns.

f. Bailey, Deardourff & Associates, the Media Directors of AFEP, served as the advertising agency

for the official 1976 general election campaign for the Republican Party candidate, Gerald Ford.

16. Defendant Fund For a Conservative Majority ("FCM") is an unincorporated association. It registered with the Commission as a "political committee" at its present address on or about May 10, 1979. It is a "political committee" within the meaning of the Fund Act. Defendant FCM conducts business within the District of Columbia. Its fundraising activities in support of the candidacy of Ronald Reagan are conducted in whole or in part from offices at 927 15th Street, N.W., in the District of Columbia. In addition, defendant FCM contracts for the purchase of media and printing services within the District of Columbia and makes related expenditures in the District of Columbia.

Count I

17. Defendant AFC is in the process of attempting to raise between $20,000,000 and $30,000,000 from members of the general public through a large-scale nationwide fundraising campaign. It intends to use the money it raises to purchase large amounts of radio and television time, as well as blocks of newspaper and magazine space, in which to run professionally prepared advertisements in support of the candidacy of Ronald Reagan. In addition to these advertisements, defendant AFC intends to prepare and distribute Ronald Reagan buttons, window signs, bumper stickers, brochures and other campaign literature.

18. Defendant AFC operates, or will operate, in the same manner as an official political campaign organization. AFC's activities in support of Ronald Reagan's candidacy are being undertaken under the name "Reagan For President in '80." Upon information and belief, the employees, consultants and agents of AFC include (or

will include), among others, professional speechwriters, pollsters, public relations experts, advertising specialists, and television and other media experts. AFC's direct mailing campaigns are or will be in whole or in part computerized.

19. Exhibits 1 and 2 to this Amended Complaint are true and correct copies of literature distributed at a July 16, 1980 press conference held by AFC. The press conference was held in the main press briefing room in Cobo Hall, Detroit, in conjunction with and as a part of the 1980 Republican National Convention. The press conference was announced on the official Republican National Convention calendar of events for July 16, 1980. Exhibit 3 to this Amended Complaint is a true and correct copy of that calendar of events.

20. Defendant AFEP is in the process of attempting to raise between $3,000,000 and $8,000,000 from members of the general public through a large-scale nationwide fundraising campaign involving both personal and direct-mail solicitation. AFEP intends to use 75% or more of the money it raises to purchase television, radio and newspaper advertising in support of the candidacy of Ronald Reagan.

21. Defendant AFEP operates, or will operate, in the same manner as an official political campaign organization. The staff director, media directors and other consultants, employees and agents of AFEP are professional political campaigners. AFEP utilizes, or will utilize, the services of professional speechwriters, pollsters, public relations experts, advertising specialists and television and other media experts. AFEP's direct mailing campaigns are or will be in whole or in part computerized.

22. Exhibit 4 to this Amended Complaint is a true and correct copy of a statement issued by defendant AFEP on or about July 9, 1980. The statement describes the activities and operations of AFEP.

23. Defendant FCM is in the process of attempting to raise between $3,000,000 and $10,000,000 from members of the general public through a large-scale nationwide direct-mail fundraising campaign. It intends to use the money it raises to purchase large amounts of radio and television time, as well as blocks of newspaper and magazine space, in which to run professionally prepared advertisements in support of the candidacy of Ronald Reagan. In addition to these advertisements, defendant FCM intends to prepare and distribute Ronald Reagan buttons, posters, lapel pins, brochures and other campaign literature.

24. Defendant FCM resembles and operates like an official political campaign organization. Its activities in support of the candidacy of Ronald Reagan are being undertaken under the name "Citizens for Reagan in '80." That name and Mr. Reagan's picture are prominently displayed on the literature prepared by FCM. FCM's direct-mail campaigns are in whole or in part computerized. Upon information and belief, the employees, consultants and agents of FCM include professional speechwriters, public relations and advertising specialists, media experts and firms that maintain and rent professionally compiled lists of potential contributors.

25. Exhibit 5 to this Amended Complaint is a true and correct copy of schedules filed by defendant FCM with the Federal Election Commission. The schedules show expenditures made by FCM in support of the candidacy of Ronald Reagan during the months of April and May 1980.

26. Exhibit 6 to this Amended Complaint is a true and correct copy of literature prepared and distributed by defendant FCM for the purpose of soliciting contributions in support of the candidacy of Ronald Reagan.

27. Ronald Reagan is the Republican Party's candidate for President. He will elect, or is likely to elect, to re-

ceive federal funding for his campaign. The expenditures made by the unofficial campaign organizations of defendants AFC, AFEP and FCM in furtherance of Mr. Reagan's candidacy would be above and beyond the expenditures that the official Reagan campaign organization will incur.

28. The Fund Act provides, in 26 U.S.C. § 9012(f)(1), that, with exceptions not material here:

> ". . . it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1000."

29. If Mr. Reagan elects to receive federal funding for his campaign (as he is likely to do), he will be an "eligible candidate" within the meaning of Section 9012(f)(1). *See* 26 U.S.C. § 9002(4). Defendants AFC, AFEP and FCM will each be a "political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election" within the meaning of Section 9012(f)(1). *See* 26 U.S.C. §§ 9002(1), (9).

30. The expenditures that defendants AFC, AFEP and FCM are incurring or will incur to further the election of Mr. Reagan would constitute "qualified campaign expenses" within the meaning of Section 9012(f) if they were incurred by an authorized committee of Mr. Reagan. *See* 26 U.S.C. § 9002(11).

31. Defendants AFC, AFEP and FCM have each incurred or will each incur, knowingly and willingly, such

expenditures in an aggregate amount exceeding $1,000. By these actions, defendants AFC, AFEP and FCM will each violate 26 U.S.C. § 9012(f)(1).

Count II

32. Plaintiffs repeat the allegations contained in the foregoing paragraphs.

33. The unofficial campaigns of defendants AFC, AFEP and FCM to further the election of Ronald Reagan will be conducted in tandem with and parallel to the official Reagan campaign. The campaigns conducted by AFC, AFEP, FCM and the official Reagan campaign organization will, upon information and belief, be coordinated with each other through information conveyed by, *inter alia*, public statements, press releases, press reports and campaign finance reports issued by AFC, AFEP, FCM and the Reagan campaign organization. Through such devices, defendants AFC, AFEP and FCM will learn of the expenditures, strategies and tactics of the official Reagan campaign and will adjust their expenditures, strategies and tactics in order to coordinate with and supplement those of the official Reagan campaign. In addition, persons in the official Reagan campaign will be able to learn through the same or similar devices of the expenditures, strategies and tactics of defendants AFC, AFEP and FCM, and will be able to adjust the activities of the official campaign in the same manner.

34. As a result, the expenditures of defendants AFC, AFEP and FCM in furtherance of Ronald Reagan's campaign are and will be contributions to the Reagan campaign within the meaning of the Fund Act and will result in violations of the Fund Act. *See* 26 U.S.C. §§ 9003(b)(2), 9012(b)(1). In addition, the expenditures made by defendants AFC, AFEP and FCM are and will be expenditures of the Reagan campaign within the meaning

of the Fund Act, *see* 26 U.S.C § 9002(11), and will result in further violations of the Fund Act. *See* 26 U.S.C. § 9003(b)(1), 9012(a)(1).

Irreparable Injury to Plaintiffs

35. The foregoing violations of law will cause irreparable injury to plaintiffs, in several ways:

(a) The unlawful actions of defendants will injure plaintiffs' right, as voters in the presidential election, to have the election process and the federal campaign funding scheme function in accordance with law and be free from the unlawful and undue influence to which large aggregations of private money may give rise.

(b) By inducing more persons to vote for Mr. Reagan than would do so if the federal election laws were complied with, the unlawful actions of defendants will dilute the votes of plaintiff Long and of those members of Common Cause who intend to vote for a candidate other than Ronald Reagan.

(c) Defendants' unlawful multi-million dollar expenditures are likely, if Ronald Reagan is elected, greatly to enhance defendants' access to, and their influence over the actions of, the federal Government and correspondingly to decrease plaintiffs' ability to influence the actions of the Government. As a result, plaintiffs' ability effectively to exercise their right to petition the Government on issues where their views differ from those of defendants will be impaired. In particular, plaintiff Cohen's ability effectively to lobby on behalf of Common Cause and its members will be impaired.

Need For Expedition

36. In order to receive federal campaign funding, Ronald Reagan must meet the conditions for eligibility set forth in 26 U.S.C. § 9003(a), (b). He is required to meet those conditions within 14 days after he is nominated as the Republican Party candidate for President. 11 C.F.R. § 141.2(d). Upon satisfying those conditions, Mr. Reagan will become an "eligible candidate" within the meaning of the Fund Act. *See* 26 U.S.C. § 9002(4).

37. The Republican Party convention, now under way, will end on July 17, 1980. Accordingly, Mr. Reagan will become an "eligible candidate" within the meaning of the Fund Act no later than July 31, 1980. The general election campaign will be underway in earnest by mid-August 1980.

38. Immediate action is needed to ensure that the Congressional scheme for federal funding of campaigns is not irreparably undermined before the Court can act. If proceedings in this case were to await Mr. Reagan's formal status as an "eligible candidate," the entry of relief by this Court would come too late to avoid causing substantial injury to plaintiffs and substantial damage to the functioning of the campaign financing scheme enacted by Congress.

PRAYER FOR RELIEF

For these reasons, plaintiffs pray:

(1) That a Court of three judges be promptly convened, as required by 26 U.S.C. § 9011(b)(2);

(2) That the Court declare defendants' actions to be unlawful under the Fund Act and enjoin defendants from continuing to take actions that violate the Fund Act;

(3) That plaintiffs be awarded costs; and

(4) That the Court enter such other and further relief as may be appropriate.

Respectfully submitted,

/s/ Louis R. Cohen
LOUIS R. COHEN

/s/ Michael L. Burack
MICHAEL L. BURACK

/s/ Roger M. Witten
ROGER M. WITTEN

/s/ Patricia D. Douglass
PATRICIA D. DOUGLAS

WILMER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Plaintiffs

Of Counsel:

KENNETH J. GUIDO, JR.
ELLEN G. BLOCK
DONALD J. SIMON
COMMON CAUSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1200

July 17, 1980

[Certificate of Service omitted in printing]

[The Exhibits to the Amended Complaint have been lodged with the Court under separate cover.]

80-847

Supreme Court, U. S.
FILED
NOV 25 1980
MICHAEL RODAK, JR., CLERK

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

COMMON CAUSE, ET AL.,
Appellants.

v.

HARRISON SCHMITT, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

EXHIBITS TO APPENDIX I TO THE JURISDICTIONAL STATEMENT

Of Counsel:

KENNETH J. GUIDO, JR.
ELLEN G. BLOCK
DONALD J. SIMON
COMMON CAUSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1200

November 25, 1980

LOUIS R. COHEN
MICHAEL L. BURACK *
ROGER M. WITTEN
CLIFFORD B. HENDLER
WILMER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Attorneys for Appellants

**Counsel of Record*

This volume contains the Exhibits to the Amended Complaint filed in *Common Cause et al.* v. *Harrison Schmitt et al.* (Civil Action No. 80-1609). The Amended Complaint appears as Appendix I to the Jurisdictional Statement. The Exhibits are being lodged separately with the Court because they cannot practicably be reproduced in the same volume with the other Appendix material.

Citations to pages in this volume are given in the Jurisdictional Statement as "App. (Supp.) ——."

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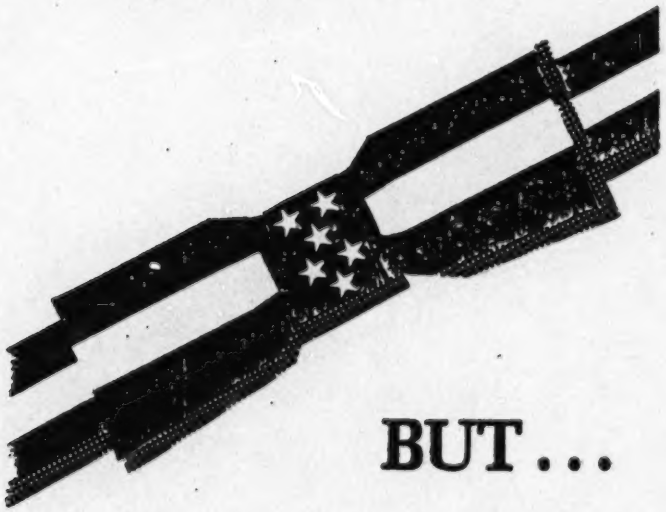
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EXHIBITS TO AMENDED COMPLAINT

EXHIBIT 1

Federal Law Prohibits Ronald Reagan

From taking your personal contribution



BUT...

THE FIRST AMENDMENT TO THE CONSTITUTION GUARANTEES YOUR RIGHT TO JOIN WITH OTHER AMERICANS FOR CHANGE

We are an independent political committee designed to increase citizen participation and awareness in the 1980 elections. One hundred people on June 5, 1980, formed AMERICANS FOR CHANGE to provide an avenue of expression for concerned citizens. This committee will enable them to participate more fully in the '80 elections, with special emphasis on the Presidential election.

"Reagan for President in '80" is being sponsored by Americans For Change, because federal campaign financing laws prohibit national candidates from accepting personal contributions since they receive federal funds.

We are looking for others who share our interests and feelings and who would like to participate in an organization which will help elect a man to the Presidency who can make the necessary changes--Ronald Reagan.



Republican Presidential Nominee Ronald Reagan.

1974, Governor Reagan and his Lt. Governor John Harmer, Co-Chairmen of Americans For Change.



RONALD REAGAN WILL RECEIVE ONLY $29 MILLION FROM THE FEDERAL ELECTION COMMISSION.

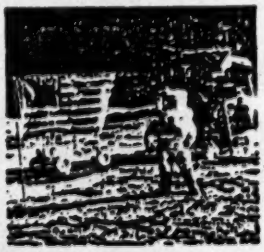
Because of the new federal laws, there are only a limited number of ways you can participate in the Presidential Election this year. If you wish to participate more fully in this election one legal and effective way is through an independent project, such as "Reagan for President in '80," one of several projects planned by Americans for Change.

If you want to see a change in this nation in 1980 it's going to take much more than the $29 million that the federal government is allowing Ronald Reagan. By comparison, in 1972 George McGovern spent $43 million on his Presidential bid. With inflation and the reduced value of the dollar, in 1980 dollars this would mean McGovern spent nearly $80 million compared to the $29 million Reagan will be allowed to spend.

Considering that Americans spend more than $575 million, or $2.67 for every man, woman, and child in the country on shampoo, $29 million isn't much to elect a man who will be leading this nation for the next four years.

Sen. Harrison (Jack) Schmitt, Chairman, Americans For Change.





Harrison (Jack) Schmitt standing with flag on the moon.

If you are saying, "Well that's for a whole year and the actual election is only one day," look at this. Americans sparkled, sizzled, flared and boomed with $240 million in fireworks this year, virtually all of it on or about July 4, 1980.

"THE COURT HELD THAT TRULY INDEPENDENT EXPENDITURES NOT COORDINATED WITH OFFICIAL ORGANIZATIONS SHOULD NOT BE FORBIDDEN...."
—*The New York Times*
Sunday, June 15, 1980

"What they are planning are called 'independent expenditures,' and they're perfectly legal. The law says a presidential candidate who accepts federal funds for his campaign can't accept or spend any other money. But the Supreme Court ruled in 1976 that individuals or committees can't be restrained from spending money independently—and independence is the key to it—to support or oppose any candidate for the presidency, the Senate or the House.

"Democrats fume that the pro-Reagan groups are using a loophole in the law to get around the spending limit on a federally financed presidential campaign. 'They're asking for a lot of trouble,' says John White, chairman of the Democratic National Committee." —*The Wall Street Journal*
Thurs. June 19, 1980

★ ★ ★

"One of the most ambitious groups is the newly formed 'Americans for Change.' They have filed as a multi-candidate political action committee, but primarily they will be concentrating on Reagan's election.... They have a wide spectrum of Republicans on their advisory board, but all of them have scrupulously avoided ties to the Reagan campaign.

"The group is welcoming contributions up to $5,000, no matter what an individual has already contributed to candidates, within the yearly $25,000 limit on political contributions.

"Because of this independent political activity has been on behalf of Reagan and not on behalf of Carter, many liberals are suggesting that the Reagan camp is deviously exploiting some 'loophole' in the federal election law.

"Yet these kinds of efforts do not spring from some legal flaw in the campaign financing act, but from the Supreme Court's *Buckley* v. *Valeo* decision which held that such independent campaigns were a guaranteed, constitutional right grounded in the 1st Amendment.

"There is also the hint from the media that Reagan, as a result of the independent operations, could end up with twice as much money as President Carter, thus putting him at a clear disadvantage. But this line of argument obviously overlooks the fact that the President, with almost unlimited access to the media, many billions of federal dollars he can ladle out to potential voters and an army of federal workers at his command, will have the greater advantage by far.

"And with the big labor unions also working their independent efforts on behalf of the President, the Carter camp will still be playing Goliath to the Reagan camp's David."
—*Human Events*
June 21, 1980

"The legal limits don't apply to committees that have no direct contact with the campaign organization, but spend on behalf of the candidate. Thus, several committees intend to avoid the spending ceiling on Reagan's behalf.

"Under the current federal election law, the Republican and Democratic nominees each get $29.4 million for the general election campaign, and they are barred from raising or spending any other funds." —*The Christian Science Monitor*
Monday, June 9, 1980

★ ★ ★

"A group of prominent Republicans yesterday said they will take advantage of a provision of the law and pump $20 million to $30 million into efforts to elect Ronald Reagan president.

They may do so under the provision allowing committees unlimited spending on behalf of a candidate as long as the committees have no direct contact with his campaign."
—*San Francisco Examiner*
Friday, June 6, 1980

★ ★ ★

"Under the election law, the major party presidential candidates each get $29.4 million in federal funds to finance their general election campaign, and are limited to spending no more than that amount. But as long as a person or group acts independently of a candidate, he or it can spend as much as desired to promote a candidacy. The Supreme Court in 1976 ruled unconstitutional a provision in the law that would have limited independent contributions.

"Fred Eiland, a spokesman for the Federal Election Commission, which oversees federal campaigns, confirmed that the law would not require the members of the group refrain from social contacts with Reagan or his aides."
—*The Minneapolis Tribune*
Friday, June 6, 1980

★ ★ ★

"A group of influential Republicans yesterday launched a drive to raise from $20 million to $30 million to promote Ronald Reagan's presidential candidacy by taking advantage of a loophole in federal election law.

"If successful, the group, headed by Sen. Harrison Schmitt (R.-N.M.), would be in position to make 'independent expenditures' almost equal to the $29.4 million in federal campaign funds major party nominees receive and are limited to spending under law.

"The group, called Americans for Change, could do so by exploiting a provision in federal election law allowing unlimited spending by committees as long as they have no contact with the campaign." —*The Washington Post*
June 6, 1980

HOW CAN I PARTICIPATE IN THE COMMITTEE?

As you probably know, the chief financer of Presidential general elections is the federal government, through the use of your tax dollars. But, for those who like to participate in our electoral system with financial support, the prohibition on direct contributions to Presidential candidates can be frustrating.

By joining with us you can contribute up to $5,000 as an individual and up to $5,000 as a Political Action Committee. This amount is over and above any contributions which you may have already given as long as you do not exceed the $25,000 limit on total contributions to all federal candidates and political committees that support them in a calendar year.

HOW WILL I KNOW HOW MY MONEY IS USED?

Your thoughts and suggestions are actively sought and needed. The decisions on expenditures must be controlled by the Committee. But, you will be kept completely up to date on the activities and expenditures of Americans For Change and "Reagan for President in '80" project through regular written communications.

We need to make a change in Washington in 1980—and that change is embodied in one man, Ronald Reagan. Not only will we have a change in the Presidency, but there will be a new cabinet with competency that can be respected.

BUT UNDER WHAT AUTHORITY CAN I PARTICIPATE IN THE PRESIDENTIAL GENERAL ELECTION?

"The term 'independent expenditure' means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate, which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion, of, any candidate, or any authorized committee or agent of such candidate."

—Federal Election Campaign Act of 1971 as amended.

★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★

PLEASE JOIN US TO MAKE A CHANGE FOR A BETTER AMERICA

Make check payable to Americans for Change.
281 North Lee Street
Suite 319
Alexandria, Virginia 22314

Paid for by Americans For Change, not authorized by any candidate.

Dear Friend,

I want to personally invite you to help elect Ronald Reagan the next President of the United States.

By joining with thousands of your interested and concerned citizens you can participate in the newly founded "Reagan for President in '80," project, established to raise over $20 million on behalf of Ronald Reagan.

The funds collected from those who share Ronald Reagan's dream for a better and more prosperous America will be used for a media drive to inform the voters of the choice they have this year—in this critical Presidential election.

Much of what we raise will be spent for independent expenditures in accordance with federal election laws.

Without your help and commitment we will be unable to achieve our goal of informing the public about Ronald Reagan. The need is great and is immediate.

Please join us. Become another American who will stand up and be counted for the change we all know is possible under responsible leadership, such as Ronald Reagan will provide.

Sincerely,

Harrison Schmitt

Senator Harrison (Jack) Schmitt (R.-N.M.)
Chairman

EXHIBIT 2



Dear Fellow American,

I was privileged eight years ago to be part of an American team that landed on the moon. Ours is the only flag that has ever flown there. At that time Ronald Reagan was completing a second successful term as Governor of California. Americans were proud of their country and flag.

I invite you to join me as a member of Americans for Change in helping to send Ronald Reagan to Washington as our President, so Americans can once again be proud of their flag and country.

The federal law prohibits you from contributing directly to the Reagan general election campaign and limits the amount of funds that he can spend on voter educational material. I urge you to become a Reagan Independent Voter Chairman and to accept the responsibility of identifying 10 Reagan voters in your community and urging them to vote on November 4, 1980.

Each person who becomes a member of Americans For Change and sends $19.80 will receive a Reagan Independent Voter Kit which will contain the educational material listed below.

If you have any questions please call me at the Detroit Plaza Hotel (568-8000) while you're in Detroit this week. The kits will be mailed to you sometime between Labor Day and September 15, 1980.

Sincerely,

Harrison Schmitt

U.S. Senator
Harrison (Jack) Schmitt
(New Mexico)

REAGAN INDEPENDENT VOTER KIT

contains:

- -1 voter identification and turnout instruction kit
- -2 Reagan window signs
- -10 Reagan election-grams
- -20 Reagan buttons
- -20 Reagan bumper stickers
- -50 issue brochures, Each on one of 5 issues, Inflation; National defense; Tax Reduction; Reduction of government regulation; and Balanced Budget.

Yes, I would like to receive my own Reagan Independent Voter Kit. Enclosed is my check payable to Americans For Change in the amount of $19.80.

Name _____

Address _____

City _____ State _____ zip _____

Occupation _____

Name of Employer _____

Phone (home) _____ (office) _____

Send to:
Americans for Change
218 North Lee Street
Alexandria, VA 22314

paid for by Americans for Change, not authorized by any candidate

EXHIBIT 3



CALENDAR
1980 · REPUBLICAN NATIONAL CONVENTION

FOR IMMEDIATE RELEASE
CONTACT: Deborah Abbot
Kathleen Keegan
Dick Schoenfeld
(313)467-1600

WEDNESDAY, JULY 16, 1980

TIME	EVENT	LOCATION
9:00 a.m.	"Who will be Reagan's VP?" - YAF Breakfast BY INVITATION ONLY (Open to the Press)	University of Detroit University Center
10:00 a.m.	Press Conference - Senator Harrison Schmitt (N.M.) Chairman, Americans for Change - Also appearing will be John Harmon, former Lt. Gov., Calif. and Howard Ruff, Founder of Ruff Times	Cobo Hall - Main Level Press Conference Room
10:00-11:00 a.m.	Seminar - "College Republican Club Organizational Technology" OPEN	Cobo Hall, Room 3077
10:00-7:00 p.m.	Belle Isle Outing - Sponsored by the Committee to Elect Metro Detroit Republican Candidates OPEN TO THE PUBLIC	Belle Isle
11:30 a.m.	"Tribute to Republican Women" luncheon hosted by the Republican Federation of Women (Nancy Reagan, Betty Heitman, Rep. Bob Michel and Mark Russell will attend)	Detroit Plaza Hotel Renaissance Ballroom
11:30 a.m.	Any foreign press or dignitaries interested in discussing the American political system - call for information - George Cook	Call for Information 467-1640
1:00 p.m.	Press Conference - Delegate Bonn Clayton (Minn.) Endorsement of Rep. Jack Kemp for VP	Cobo Hall - Main Level Press Conference Ctr.
2:00-3:00 p.m.	Reagan Youth Committee Panel Discussion with William Buckley (Moderator), Lugar, Simon and Rumsfeld OPEN TO THE PRESS	Ford Auditorium
2:00-5:00 p.m.	National Black Network Reception PRESS ONLY	Detroit Plaza Hotel Mackinac Ballroom East
3:00 p.m.	Press Conference - Republican National Hispanic Assembly	Cobo Hall - Main Level Press Conference Ctr.
3:00-5:00 p.m.	College Republican National Committee Reception OPEN (Press conference with guest speakers at 3:00)	Pontchartrain Hotel Versailles Ball

—MORE—

TIME	EVENT	LOCATION
3:00 p.m.	Reception & Mini Workshop - "Maintaining American Political Leadership Through Political Clubs" OPEN	Book Cadillac Hotel English Room
3:00-4:30 p.m.	Reception hosted by Industrial Michigan PAC in honor of Republican Governors INVITATION ONLY	Detroit Plaza Hotel Marquette Room
3:00-5:00 p.m.	British Tourist Authority Reception for the Press	Pontchartrain Hotel Plaza Rooms A & B
3:30 p.m.	Press Availability - Sen. John Heinz, Chrm., National Republican Senatorial Committee will meet with any Reporters interested in the 1980 Senatorial Races	NRSC Office 1st Floor VMB
4:00 p.m.	Press Conference - Program Planning	Cobo Hall - Main Level Press Conference Room
4:00-7:00 p.m.	Reception for the Senior Citizens (Delegates and Alternates Only)	Pontchartrain Hotel Ontario Room
5:00-7:00 p.m.	Reception sponsored by the American-Israel Public Affairs Committee for Members of Congress INVITATION ONLY	Standard Club of Detroit 400 Rennaisance Center
5:00-7:00 p.m.	Reception hosted by the Republican National Hispanic Assembly of the U.S. - "Fiesta" INVITATION ONLY (Open to the Press)	Detroit Plaza Hotel Marquette Room
5:00-7:00 p.m.	Reception hosted by the Local Elections Division, Republican National Committee BY INVITATION ONLY	Detroit Plaza Hotel Cartier Room
5:00-7:00 p.m.	Reception for Life Members Hosted by the Republican National Finance Committee BY TICKET ONLY	Detroit Plaza Hotel LaSalle A & B
6:00 p.m.	Reagan Youth Rally with Phil Everly, the Whitney's and Donnie and Marie Osmond (Gov. Reagan will attend) INVITATION ONLY	Ford Auditorium
6:15-8:00 p.m.	Friends of Phil Crane Reception for Delegates and Alternates and Members of the Media	Pontchartrain Hotel Versailles Ballroom
7:00 p.m.	Fourth Session of the 1980 Republican National Convention CREDENTIALS ONLY	Joe Louis Arena
8:00-12:00 midnight	Reception for Sustaining Members Hosted by the Republican Finance Committee BY TICKET ONLY	Detroit Plaza Hotel LaSalle A & B

DURING CONVENTION WEEK:

9:00 a.m. to 10:00 p.m.	The Best of Detroit and Michigan	Ontario Exhibit Hall Detroit Plaza Hotel

—30—

EXHIBIT 4

AMERICANS FOR AN EFFECTIVE PRESIDENCY
1225 19th Street, N.W., Suite 415
Washington, D.C. 20036

FROM: Peter Flanigan, Chairman
Americans for an Effective Presidency

TO: Prospective Contributors

RE: Objectives, Perspective and Operation of Americans for an Effective Presidency

It is our intention to communicate the contents of this memorandum -- in its present or in summary form -- to every prospective contributor to Americans for an Effective Presidency.

We invite contributions from those who share in common with us the objectives and perspective of the organization and understand the way it intends to pursue those objectives.

A. Objectives

Americans for an Effective Presidency is a group of individuals gathered together to exercise their constitutional rights to participate in the political process. As such, it is an independent expenditures committee under the Federal Election Campaign Act. It is not authorized by any candidate, by any candidate's Committee or by any national political party.

Its objectives are to raise funds from like-thinking Americans and to expend funds to defeat the re-election campaign of Jimmy Carter, to elect Ronald Reagan President, and to further Governor Reagan's prospects of victory should the presidential election have to be decided in the U.S. House of Representatives.

Paid for by Americans for an Effective Presidency,
An Independent Expenditures Committee Under the Federal Election Campaign Act;
Not Authorized By Any Candidate or Candidate's Committee

Therefore, it will make expenditures in support of Governor Reagan's election as President and in support of selected Republican candidates for Congress in expectation of their support of Governor Reagan should the election go into the House.

We intend to comply with all existing law by maintaining total independence from the Reagan campaign committee, the Republican National Committee, and their leadership, strategists, and operational personnel.

B. Perspective

All contributors should share the commonly held beliefs of the founding members of Americans for an Effective Presidency. They are the following:

1. The presidential election of 1980 may be the most important in our nation's history.

2. The continuation of Jimmy Carter in office would severely threaten the economic stability of the country and the effectiveness of the free world alliances upon which world peace depends.

3. In the past three years, the defense preparedness of the United States has been allowed to decline to a point of genuine jeopardy to our country and our people.

4. At the same time economic mismanagement by the current administration has permitted inflation at record levels and unemployment at rising levels to undermine the economic security of most American families.

5. At the same time the policies of the current administration have both prevented needed business reinvestment and furthered burdensome government regulation at the expense of big and small business alike and American's workers and America's consumers.

6. And at the same time, indecisive leadership by the current administration has denied the country an effective, understandable or supportable plan for energy independence.

Best Copy Available

7. Of the candidates currently running for President, Ronald Reagan is most clearly able to correct these deficiencies and restore American stability, security, confidence and pride.

8. Because of the utmost importance of the election, it is essential to assure effective communications to the voters of Reagan's strengths and Carter's deficiencies.

9. It is the responsibility of all who share these beliefs to do all within their power to assure the defeat of Jimmy Carter and the election of Ronald Reagan.

10. Because the candidacy of John Anderson might prevent any candidate from winning an Electoral College majority and require the House of Representatives to make the choice, it is important for all who share these beliefs to help elect House candidates who would be expected to vote for Ronald Reagan.

These shared views of the founding members of Americans for an Effective Presidency, as listed on our letterhead, form the perspective of the organization. Many of the founding members have held high public office. Their individual views may be familiar to many potential contributors. Any who wish a further presentation of their individual views are invited to write them personally or to write Americans for an Effective Presidency.

C. Operations

Every contributor to Americans for an Effective Presidency is a Member of the organization. All Members who wish to do so may become Participating Members by filling out a questionnaire attesting to their personal independence from the strategy, planning and operations of the Reagan campaign and campaigns for candidates for the U.S. House of Representatives. Approval of a Member as a Participating Member will be automatic unless the staff and an appointed committee of the founding members determines from the submitted questionnaire that participation in policy questions by the Member would jeopardize the independence of the organization under the law.

All Participating Members (including all founding members) will be periodically polled and invited to periodic meetings to consider policy questions before the organization.

An Expenditures Committee (as indicated on the letterhead) has been established to provide supervisory direction to the staff of the organization. They have been chosen for their broad political experience and judgment.

The Expenditures Committee shall solicit the views of the full Participating Membership on major questions of policy. And taking those views into account, it shall determine all expenditures by the organization, hire all staff, provide for legal counsel, supervise all record-keeping, authorize all fund-raising, and represent the organization to the media and the public.

Thomas Reed shall serve as Chairman of the Expenditures Committee and shall provide policy guidance and regular supervision of the staff on behalf of the Expenditures Committee. Mr. Reed, serving as chairman or director of various statewide campaigns in the Western United States over the past 14 years, enjoys an unbroken record of electoral success.

Robert Masson shall serve as Treasurer of the Committee. Mr. Masson is Treasurer of Pepsico, Inc., and is an experienced financial manager.

Professional staff will be retained to implement all aspects of the organization's program. All staff personnel will be required to fill out the same questionnaire that Participating Members fill out in order to assure total independence for the organization. The original staff of Americans for an Effective Presidency includes:

-- Staff Director: Don Fierce: 1976 regional political director for President Ford. Managed numerous Republican campaigns for Congressional and statewide offices.

-- Media Directors: Bailey, Deardourff & Associates: 1976 general election advertising agency for President Ford. The firm counts ten of the 19 current Republican Governors among their clients.

It is expected that the program implemented by the staff, under the supervision of the Expenditures Committee, will include:

-- Solicitation, via personal and direct mail fund-raising, of several million dollars in contributions.

-- The placement of 75% or more of all funds in television, radio and newspaper advertising to defeat Jimmy Carter, elect Ronald Reagan and increase the likelihood of Ronald Reagan's election if the House of Representatives must decide. The timing and location of such advertising shall be determined by the Expenditures Committee after input from Participating Members and after professional analysis by the staff. The content of such advertising shall be consistent with the objectives and the perspective of the organization as expressed in this memo. Each piece of advertising shall be authorized by the Expenditures Committee only after determination that it is consistent with the views of the Participating Members.

-- Occasional presentation of the views of public figures associated with the organization on subjects relevant to their expertise and consistent with the shared perspective of the Members.

-- Broad (but targeted) media distribution of recorded statements relevant to the campaign by public figures expressing views consistent with the shared perspective of the Members.

-- Consideration of direct contributions to campaigns of candidates for the U.S. House of Representatives where appropriate to increase the likelihood of Governor Reagan's victory in case the presidential election must be decided in the House. Such contributions would be in addition to or rather than media expenditures made in support of their candidacy. In determining when and where such contributions or expenditures are appropriate, the Expenditures Committee will rely on professional staff analysis.

Expenditures are not planned for any of the following types of activities which would be typical of a campaign organization:

-- Buttons, bumper strips and similar handout paraphernalia of a traditional candidate campaign.

-- Field and precinct organization for Election Day activities.

-- Phone bank or other voter canvassing activities.

D. Summary

It is our hope that all Americans who share the objectives and perspective of Americans for an Effective Presidency, and who understand its contemplated operations, will want to exercise their constitutional right to contribute to its efforts and become a Member. We want their support. We want their participation in its policy decisions to the degree that each individual's actual participation in policy will preserve the legally required independence of the organization from the Reagan campaign and the Republican National Committee.

Our country is on the line in this election. We intend to do something about it. And we want your help.

EXHIBIT 5

SCHEDULE B

ITEMIZED INDEPENDENT EXPENDITURES

Page 1 of 9 Pages

Name of Committee (in Full)
The Fund for a Conservative Majority

I.D. No.
C00001966

Full Name, Mailing Address & ZIP Code of Each Payee	Purpose of Expenditure	Date of Expenditure (Mo., Year)	Amount	Name of Federal Candidate supported or opposed by the expenditure & office sought
Lloyd Daugherty Rt. #4 Beavercreek Dr. Powell, Tn. 37849	Consulting services	4/1/80	300.00	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Lloyd Daugherty	To reimburse for mileage and meal expenses.	4/1/80	461.16	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Name Exchange 7015 Old Keene Mill Rd. Suite #203 Springfield, Va. 22150	List rental Calif. pkg.	4/2/80	4000.00	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Name Exchange	List rental	4/2/80	287.50	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Name Exchange	List rental	4/2/80	4801.15	Ronald Reagan U. S. President ☒ Support ☐ Oppose
P. R. Promotions 833 West Jefferson St. Suite 100 Louisville, Ky. 40202	Posters and buttons.	4/2/80	1740.94	Ronald Reagan U. S. President ☒ Support ☐ Oppose

(a) SUBTOTAL of Itemized Independent Expenditures . . . . . $ _____

(b) SUBTOTAL of Unitemized Independent Expenditures . . . . . $ _____

(c) TOTAL Independent Expenditures. . . . . $ _____

Under penalty of perjury I certify that the Independent Expenditures reported herein were not made in cooperation, consultation, concert with, or at the request or suggestion of any candidate or any authorized committee or agent of such candidate or authorized committee. Furthermore, these Independent Expenditures were not made with the knowledge of any candidate's campaign plans, projects or needs or of any of the campaign materials prepared by the candidate, his campaign committees, or their agents.

Signature _____ Date May 19, 1980

Subscribed and sworn to before me this 19th day of May, 1980

My Commission expires April 14, 1984

Notary Public

00031563991

SCHEDULE E

ITEMIZED INDEPENDENT EXPENDITURES

Page 2 of 9 Pages

Name of Committee (in Full): The Fund for a Conservative Majority

I.D. No.: C00001966

Full Name, Mailing Address & ZIP Code of Each Payee	Purpose of Expenditure	Date (month, day, year)	Amount	Name of Federal Candidate supported or opposed by the expenditure & office sought
J & R Quick Print 3710 Kingston Park Knoxville, Tn. 37919	Printing expense	4/4/80	26.50	Ronald Reagan U. S. President ☒ Support ☐ Oppose
United Parcel Service 2702 Tarbus Rd. Richmond, Va. 23229	Delivery services	4/4/80	9.38	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Lloyd Daugherty	To reimburse for meals and mileage expense.	4/4/80	254.81	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Suburban Publishers c/o Seymour Holtzman 33 Sahara Kingston, Pa. 18704	Printing expense	4/4/80	500.00	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Printers, Inc. 9144 Euclid Ct. Manassas, Va. 22110	Printing expense	4/7/80	202.80	Ronald Reagan U. S. President ☒ Support ☐ Oppose
J & R Quick Print	Printing expense	4/7/80	111.30	Ronald Reagan U. S. President ☒ Support ☐ Oppose

(a) SUBTOTAL of Itemized Independent Expenditures . . . . . $ _____

(b) SUBTOTAL Unitemized Independent Expenditures . . . . . $ _____

(c) TOTAL Independent Expenditures . . . . . $ _____

Under penalty of perjury I certify that the independent expenditures reported herein were not made in cooperation, consultation, concert with, or at the request or suggestion of any candidate or any authorized committee or agent of such candidate or authorized committee. Furthermore, these expenditures did not involve the furnishing of coordinated, compensation, or reimbursement in whole or in part of any contribution previously received by the committee, its contributors, or their agents.

_____ _____
Signature Date

Subscribed and sworn to before me this _____ day of _____, 19__

My Commission expires

_____ _____
NOTARY PUBLIC

U00315639941

SCHEDULE E

ITEMIZED INDEPENDENT EXPENDITURES

Page 3 of 9 Pages

Name of Committee (in Full)	I.D. No.
The Fund for a Conservative Majority	C00001966

Full Name, Mailing Address & ZIP Code of Each Payee	Purpose of Expenditure	Date (month, day, year)	Amount	Name of Federal Candidate supported or opposed by the expenditure & office sought
David Sanders 6930 Espey Lane McLean, Va. 22101	To reimburse for lodging, meals and gas expense.	4/7/80	384.88	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Add-Ritz 301 Magnolia Ave. Knoxville, Tn. 37917	Rental-office equipment	4/9/80	114.00	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Thompson & Assoc.,Inc. 7015 Old Keene Mill Rd. Suite 203 Springfield, Va. 22150	Mailing expense	4/10/80	15000.00	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Broadcast News- Wash. 1428 Wisconsin Ave. NW Washington DC 20007	Reagan spots per Rhetcom Assoc.	4/11/80	863.40	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Smarr Mailing Inc. 5380 Eisenhower Ave. Alexandria, Va. 22304	Postage expense.	4/11/80	15900.00	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Frank Enten 5305 Wilson Lane Bethesda, Md. 20014	Buttons expense	4/14/80	1282.00	Ronald Reagan U. S. President ☒ Support ☐ Oppose

(a) SUBTOTAL of itemized independent expenditures . . . . . $ _____

(b) SUBTOTAL of unitemized independent expenditures . . . . . $ _____

(c) TOTAL independent expenditures . . . . . $ _____

Under penalty of perjury I certify that the independent expenditures reported herein were not made in cooperation, consultation, concert with, or at the request or suggestion of any candidate or any authorized committee or agent of such candidate or authorized committee. Furthermore, these expenditures did not involve the furnishing of contributions, accommodations, or reimbursements to anyone or to any of any campaign materials prepared by the candidate, his campaign committees, or their agents.

_____ _____
Signature Date

Subscribed and sworn to before me this _____ day of _____, 19__

My Commission expires

_____ _____
NOTARY PUBLIC

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SCHEDULE E

ITEMIZED INDEPENDENT EXPENDITURES

Page 4 of 9 Pages

Name of Committee (in Full)	I.D. No.
The Fund for a Conservative Majority	C00001966

Full Name, Mailing Address & ZIP Code of Each Payee	Purpose of Expenditure	Date (Month, Day, Year)	Amount	Name of Federal Candidate supported or opposed by the expenditure & office sought
Postmaster	Bulk mail permit	4/14/80	70.00	Ronald Reagan U. S. President ☒ For ☐ Against
Mass Exchange	List rental	4/14/80	5821.65	Ronald Reagan U. S. President ☒ For ☐ Against
Smarr Mailing	Postage	4/15/80	397.80	Ronald Reagan U. S. President ☒ For ☐ Against
Smarr Mailing	Postage	4/15/80	2011.93	Ronald Reagan U. S. President ☒ For ☐ Against
Artype P. O. Box 671 Springfield, Va. 22150	Printing expense	4/15/80	126.00	Ronald Reagan U. S. President ☒ For ☐ Against
Paperworks 2876 Eastland Rd. Falls Church, Va. 22043	Printing expense	4/15/80	308.65	Ronald Reagan U. S. President ☒ For ☐ Against

(a) SUBTOTAL of Supporting Independent Expenditures . . . . . $ _____

(b) SUBTOTAL of Opposing Independent Expenditures . . . . . $ _____

(c) TOTAL, Independent Expenditures . . . . . $ _____

Under penalty of perjury I certify that the independent expenditures reported herein were not made in cooperation, consultation, concert with, or at the request or suggestion of any candidate or any authorized committee or agent of such candidate or authorized committee. Furthermore, these expenditures are not exempt from the reporting of independent expenditures, or reimbursement in whole or in part of any earmarked payments prohibited by the candidate, his campaign committee, or their agent.

_____ _____
Signature Date

Subscribed and sworn to before me this _____ day of _____, 19__

My Commission expires:

_____ _____
NOTARY PUBLIC

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SCHEDULE B

ITEMIZED INDEPENDENT EXPENDITURES

Page 5 of 9 Pages

Name of Committee (In Full)
The Fund for a Conservative Majority

I.D. No.
C00001966

Full name, mailing address & ZIP Code of Each Payee	Purpose of Expenditure	Date (Mo., Day, Yr.)	Amount	Name of Federal Candidate supported or opposed by the expenditure & office sought
P. S. Enterprises 3902-04 Old Silver Hill Silver Hill, Md. 20023	Printing expense	4/15/80	1246.44	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Envelopes, Inc. 1112 North Fairfax St. Alexandria, Va. 22314	Printing expense	4/15/80	11031.90	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Name Exchange	List rental	4/15/80	54.44	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Talepost 1700 Old Meadow Rd. McLean, Va. 22102	Postage	4/15/80	602.64	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Community Improvement Assoc. 2300 Laral Ave. Knoxville, Tn. 37916	Reagan booth for Community Fair	4/16/80	40.00	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Talepost	Postage	4/16/80	750.00	Ronald Reagan U. S. President ☒ Support ☐ Oppose

(a) SUBTOTAL of Itemized Independent Expenditures . . . . . $ _____
(b) SUBTOTAL of Unitemized Independent Expenditures . . . . . $ _____
(c) TOTAL Independent Expenditures . . . . . $ _____

Under penalty of perjury I certify that the independent expenditures reported herein were not made in cooperation, consultation, concert with, or at the request or suggestion of any candidate or any authorized committee or agent of such candidate or authorized committee. Furthermore, these expenditures did not involve the financing of dissemination, distribution, or republication in whole or in part of any campaign materials prepared by the candidate, his campaign committees, or their agents.

_____ _____
Signature Date

Subscribed and sworn to before me this _____ day of _____, 19__

My Commission expires

_____ _____
NOTARY PUBLIC

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SCHEDULE E

ITEMIZED INDEPENDENT EXPENDITURES

Page 6 of 9 Pages

Name of Committee (In Full)
The Fund for a Conservative Majority

I.D. No.
C00001966

Full name, mailing address & ZIP Code of Each Payee	Purpose of Expenditure	Date Incurred (mo./day/yr.)	Amount	Name of Federal Candidate supported or opposed by the expenditure & office sought
Lloyd Daugherty	To reimburse for meals, gas and resources expense.	4/21/80	693.32	Ronald Reagan U. S. President ☒ For ☐ Against
Mailroom Rt. #1, Box 1002 Woodland Rd. Sterling, Va. 22170	Reagan kits and postage.	4/22/80	236.00	Ronald Reagan U. S. President ☒ For ☐ Against
Thompson & Assoc. Inc.	Mailing services	4/23/80	6332.00	Ronald Reagan U. S. President ☒ For ☐ Against
Airborne Freight Corp. P. O. Box 662 Seattle, Wash. 98111	Delivery services	4/24/80	26.30	Ronald Reagan U. S. President ☒ For ☐ Against
Thompson & Assoc. Inc.	Mailing services	4/24/80	200.00	Ronald Reagan U. S. President ☒ For ☐ Against
Lion & Fox Recording Inc. P. O. Box 1639 Springfield, Va. 22151	Reagan spots	4/24/80	73.50	Ronald Reagan U. S. President ☒ For ☐ Against

(a) SUBTOTAL of Itemized Independent Expenditures . . . . . $ _____
(b) SUBTOTAL of Unitemized Independent Expenditures . . . . . $ _____
(c) TOTAL, Independent Expenditures . . . . . $ _____

Under penalty of perjury I certify that the independent expenditures reported herein were not made in cooperation, consultation, concert with, or at the request or suggestion of any candidate or any authorized committee or agent of such candidate or authorized committee. Furthermore, these expenditures are not made to reimburse the reporting or contributing individual for any loan made or guaranteed by such individual on behalf of any candidate reported by the committee, for any contribution, or other receipt.

_____ _____
Signature Date

Subscribed and sworn to before me this _____ day of _____, 19__

My Commission expires

_____ _____
NOTARY PUBLIC

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SCHEDULE E

ITEMIZED INDEPENDENT EXPENDITURES

Page 7 of 9 Pages

Name of Committee (in Full): The Fund for a Conservative Majority

I.D. No.: C00001966

Full Name, Mailing Address & ZIP Code of Each Payee	Purpose of Expenditure	Date (month, day, year)	Amount	Name of Federal Candidate supported or opposed by the expenditure & office sought
Carmir Video 1600 S. Eads St./534 N Arlington, Va. 22202	Reagan video spot	4/24/80	1475.00	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Airborne Freight Corp.	Delivery expense.	4/24/80	329.75	Ronald Reagan U. S. President ☒ Support ☐ Oppose
EF & A Advertising 39 Lee Rd. Livingston, N.J. 07039	Consulting services	4/24/80	1075.00	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Arcype	Printing expense	4/24/80	95.00	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Park Lane Press Fallsway Building 1501 North Guilford Ave. Baltimore, Md. 24202	Printing expense	4/24/80	14548.56	Ronald Reagan U. S. President ☒ Support ☐ Oppose
P. E. Promotions	Buttons expense	4/24/80	269.38	Ronald Reagan U. S. President ☒ Support ☐ Oppose

(a) SUBTOTAL of Itemized Independent Expenditures . . . . . $ _____

(b) SUBTOTAL of Unitemized Independent Expenditures . . . . . $ _____

(c) TOTAL Independent Expenditures . . . . . $ _____

Under penalty of perjury I certify that the independent expenditures reported herein were not made in cooperation, consultation, concert with, or at the request or suggestion of any candidate or any authorized committee or agent of such candidate or authorized committee. Furthermore, these expenditures did not involve the rendering of clearinghouse information, or republication in whole or in part of any campaign materials prepared by the candidate, his campaign committees, or their agent.

_____ _____
Signature Date

Subscribed and sworn to before me this _____ day of _____, 19____

My Commission expires:

_____ _____
NOTARY PUBLIC

00031569696

SCHEDULE E

ITEMIZED INDEPENDENT EXPENDITURES

Page 8 of 9 Pages

Name of Committee (in Full): The Fund for a Conservative Majority

I.D. No.: C00001966

Full Name, Mailing Address & ZIP Code of Each Payee	Purpose of Expenditure	Date (Month, day, year)	Amount	Name of Federal Candidate supported or opposed by the expenditure & office sought
Name Exchange	List rental	4/25/80	1443.59	Ronald Reagan U. S. President ☒ For ☐ Against
Uniphoto 1071 Wisconsin Ave. NW Washington DC 20007	Reagan picture expense.	4/28/80	250.00	Ronald Reagan U. S. President ☒ For ☐ Against
Southern Central Bell Telephone Co. 706 Walnut St. Knoxville, Tn. 37902	Telephone expense for Lloyd Daugherty	4/29/80	460.50	Ronald Reagan U. S. President ☒ For ☐ Against
H & R Block 5401 Clinton Hwy. Knoxville, Tn. 37912	Deposit-office space for Lloyn Daugherty	4/29/80	577.50	Ronald Reagan U. S. President ☒ For ☐ Against
Lloyd Daugherty	Consulting fee	4/30/80	300.00	Ronald Reagan U. S. President ☒ For ☐ Against
Name Exchange	List rental	4/30/80	708.18	Ronald Reagan U. S. President ☒ For ☐ Against

(a) SUBTOTAL of Itemized Independent Expenditures . . . . . $ _____

(b) SUBTOTAL of Unitemized Independent Expenditures . . . . . $ _____

(c) TOTAL, Independent Expenditures . . . . . $ _____

Under penalty of perjury I certify that the Independent Expenditures reported herein were not made in cooperation, consultation, concert with, or at the request or suggestion of any candidate or any authorized committee or agent of such candidate or authorized committee. Furthermore, these expenditures were not made pursuant to any understanding, communication, or coordination or in violation of or in lieu of any campaign proposal provided by the candidate, his campaign committee, or their agent.

_____ _____
Signature Date

Subscribed and sworn to before me this _____ day of _____, 19__

My Commission expires _____

_____
NOTARY PUBLIC

C00031564:00

SCHEDULE E

ITEMIZED INDEPENDENT EXPENDITURES

Page 9 of 9 Pages

Name of Committee (in Full)
The Fund for a Conservative Majority

I.D. No.
C00001988

Full Name, Mailing Address & ZIP Code of Each Payee	Purpose of Expenditure	Date (Month, day, year)	Amount	Name of Federal Candidate supported or opposed by this expenditure & office sought
Thompson & Assoc. Inc.	Mailing services	4/30/80	8000.00	Ronald Reagan U. S. President ☒ For ☐ Against
				Ronald Reagan U. S. President ☒ For ☐ Against
				Ronald Reagan U. S. President ☒ For ☐ Against
				Ronald Reagan U. S. President ☒ For ☐ Against
				Ronald Reagan U. S. President ☒ For ☐ Against
				Ronald Reagan U. S. President ☒ For ☐ Against

(a) SUBTOTAL of Itemized Independent Expenditures	$	
(b) SUBTOTAL of Unitemized Independent Expenditures	$	
(c) TOTAL Independent Expenditures		$ 126,295.45

Under penalty of perjury I certify that the independent expenditures reported herein were not made in cooperation, consultation, concert with, or at the request or suggestion of any candidate or any authorized committee or agent of such candidate or authorized committee. Furthermore, these expenditures did not involve the ordering of, purchasing of, or participation in any of the goods, services or broadcasts for the communication. Signature

Kathleen L. Bolton
Signature

Treasurer
Title

Subscribed and sworn to before me this 2nd day of May, 19 80

My Commission expires April 10, 1984

NOTARY PUBLIC

C00031564001

SCHEDULE E

ITEMIZED INDEPENDENT EXPENDITURES 30b

Page 1 of 7 Pages

(See Reverse Side for Instructions)

Name of Committee (in Full)
The Fund for a Conservative Majority

ID No
C00301976

Full Name, Mailing Address & ZIP Code of Each Payee	Purpose of Expenditure	Date (Month, Day, Year)	Amount	Name of Federal Candidate Supported or Opposed by the Expenditure & Office Sought
Bond Office Services 14498 Telegraph Rd. Woodbridge, VA	Postage	5/1/80	$31,840.00	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Thompson & Assoc. 7015 Old Keene Mill Rd. Springfield, VA	Mailing Service	5/1/80	$ 4528.80	Ronald Reagan U. S. President ☐ Support ☐ Oppose
Western YAF 7917 Balboa Suite A San Diego, CA 92111	Ad in Regional Program	5/5/80	$ 100.00	Ronald Reagan U. S. President ☐ Support ☐ Oppose
Lloyd Daugherty Route 4 Beavercreek Drive Powell, TN 37849	Meals, mileage, and source material for 4/15 - 4/30	5/5/80	$ 601.34	Ronald Reagan U. S. President ☐ Support ☐ Oppose
Potomac Asso. P. O. Box 57204 Washington, DC 20037	Printing Exp.	5/7/80	$ 343.87	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Kane Delivery Ltd. 12411 Washington Ave. Rockville, MD 20852	Delivery Service	5/8/80	$ 39.65	Ronald Reagan U. S. President ☒ Support ☐ Oppose

(a) SUBTOTAL of Itemized Independent Expenditures $ _____

(b) SUBTOTAL of Unitemized Independent Expenditures $ _____

(c) TOTAL Independent Expenditures $ 143,379.06

Under penalty of perjury I certify that the independent expenditures reported herein were not made in cooperation, consultation, concert with, or at the request or suggestion of any candidate or any authorized committee or agent of such candidate or authorized committee. Furthermore, these expenditures did not involve the furnishing of contribution, contribution or reimbursement to any or all of the candidate materials prepared by the candidate, his campaign committee, or their agents.

_____ _____
Signature Date

Subscribed and sworn to before me this _____ day of _____, 19__

_____
My Commission expires

_____
Notary Public

SCHEDULE E

ITEMIZED INDEPENDENT EXPENDITURES

31b Page 2 of 7 Pages

(See Reverse Side for Instructions)

Name of Committee (in Full)
The Fund for a Conservative Majority

I.D. No.
C00001966

Full Name, Mailing Address & ZIP Code of Each Payee	Purpose of Expenditure	Date (month, day, year)	Amount	Name of Federal Candidate Supported or Opposed by the Expenditure & Office Sought
Bond Office Services 14118 Telegraph Rd. Woodbridge, VA 22192	Vice Pres. Survey Expenses	5/12/80	16,675.00	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Sherrod Sign & Graphics P. O. Box 3085 Knoxville, TN 37197	Sign for HQ in TN.	5/16/80	125.00	Ronald Reagan U. S. President ☐ Support ☐ Oppose
Bond Office Services	Postage & Mail Serv.	5/12/80	33,666.00	Ronald Reagan U. S. President ☐ Support ☐ Oppose
Artype P. O. Box 671 Springfield, VA 22150	Typesetting/Design	5/27/80	80.00	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Chromatic Inc. 1503 South County Trail East Greenwich, RI 02818	Reagan Lapel Pins	5/27/80	939.14	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Envelopes Inc. 112 North Fairfax St. Alexandria, VA 22314	Printing Services	5/27/80	492.70	Ronald Reagan U. S. President ☒ Support ☐ Oppose

(a) SUBTOTAL of Itemized Independent Expenditures $ _____

(b) SUBTOTAL of Unitemized Independent Expenditures $ _____

(c) TOTAL Independent Expenditures : $ _____

Under penalty of perjury I certify that the independent expenditures reported herein were not made in cooperation, consultation, concert with, or at the request or suggestion of any candidate or any authorized committee or agent of such candidate or authorized committee. Such expenditures were not made to finance the printing or dissemination, distribution, or republication, in whole or in part of any campaign materials prepared by the candidate, his campaign committee, or their agents.

_____ _____
Signature Date

Subscribed and sworn to before me this _____ day of _____, 19__

My Commission expires

_____ _____
Notary Public

ITEMIZED INDEPENDENT EXPENDITURES

32b Page 3 of 7 Pages

(See Reverse Side for Instructions)

Name of Committee (in Full)	I.D. No.
The Fund for a Conservative Majority	C00001966

Full Name, Mailing Address & ZIP Code of Each Payee	Purpose of Expenditure	Date (month, day, year)	Amount	Name of Federal Candidate Supported or Opposed by the Expenditure & Office Sought
Whatican & Assoc. Inc. 1011 Arlington Blvd. #131 Arlington, VA 22209	Public Relations Proffesional Fees	5/27/80	143.70	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Paperworks 2876 Hartland Rd. Falls Church, VA 22043	Printing Expenses	5/27/80	156.00	Ronald Reagan U. S. President ☐ Support ☐ Oppose
Park Lane Press	Advertising Fees	5/27/80	313.04	Ronald Reagan U. S. President ☐ Support ☐ Oppose
Wiland & Assoc. Inc. 219 East Davis St. Culpepper, VA 22701	Printing Expenses	5/27/80	1299.00	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Diversified Direct Inc. 2936 Prosperity Ave. Fairfax, VA 22031	Printing Services	5/27/80	2112.14	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Thompson & Assoc. 7015 Old Keene Mill Rd. Suite 203 Springfield, VA 22150	Artwork Services	5/27/80	25.00	Ronald Reagan U. S. President ☒ Support ☐ Oppose

(a) SUBTOTAL of Itemized Independent Expenditures $ _____

(b) SUBTOTAL of Unitemized Independent Expenditures $ _____

(c) TOTAL Independent Expenditures $ _____

Under penalty of perjury I certify that the independent expenditures reported herein were not made in cooperation, consultation, concert with or at the request or suggestion of any candidate or any authorized committee or agent of such candidate or authorized committee. These expenditures did not involve the ordering of distribution, or republication in whole or in part of any campaign materials prepared by the candidate, his campaign committee, or their agents.

_____ _____
Signature Date

Subscribed and sworn to before me this _____ day of

_____, 19____

My Commission expires

_____ _____
NOTARY PUBLIC

SCHEDULE E

ITEMIZED INDEPENDENT EXPENDITURES

33b

(See Reverse Side for Instructions)

Name of Committee (in Full): The Fund for a Conservative Majority

I.D. No: C00001966

Full Name, Mailing Address & ZIP Code of Each Payee	Purpose of Expenditure	Date (month, day, year)	Amount	Name of Federal Candidate supported or opposed by the expenditure & office sought
Fine Print Inc. 5403 Annapolis Rd Bladensburg, MD 20710	Reagan Brochures Printing Exp.	5/28/80	636.28	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Rem Printing & Graphics 1112 North Fairfax St. Alexandria, VA 22314	Printing Services	5/28/80	145.60	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Smart Mailing Inc. 5380 Eisenhower Ave. Alexandria, VA 22304	Direct Mail Fees	5/28/80	778.57	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Thompson & Assoc. Inc.	Direct Mail Fees	5/28/80	1318.45	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Lion & Fox Recording Inc. P. O. Box 1639 Springfield, VA 22151	Recording for Radio Advertising	5/28/80	158.83	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Name Exchange 7015 Old Keene Mill Rd. #203 Springfield, VA 22150	List Rental	5/28/80	242.36	Ronald Reagan U. S. President ☒ Support ☐ Oppose

(a) SUBTOTAL of Itemized Independent Expenditures $ _____

(b) SUBTOTAL of Unitemized Independent Expenditures $ _____

(c) TOTAL Independent Expenditures $ _____

Under penalty of perjury I certify that the independent expenditures reported herein were not made in cooperation, consultation, concert with, or at the request or suggestion of any candidate or any authorized committee or agent of such candidate or authorized committee. Furthermore these expenditures did not involve the financing of dissemination, distribution, or republication, in whole or in part of any campaign materials prepared by the candidate, his campaign committee, or their agent.

_____ Signature

_____ Date

Subscribed and sworn to before me this _____ day of _____, 19__

_____

My Commission expires

_____

_____ Notary Public

ITEMIZED INDEPENDENT EXPENDITURES

34b

Page 6 of 7 Pages

(See Reverse Side for Instructions)

Name of Committee (in Full)	ID No
The Fund for a Conservative Majority	C00001966

Full Name, Mailing Address & ZIP Code of Each Payee	Purpose of Expenditure	Date (month, day, year)	Amount	Name of Federal Candidate supported or opposed by the expenditure & office sought
Park Lane Mailing Service	Mailing Service	5/28/80	1526.51	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Thompson & Assoc. Inc.	Artwork expenses for mail.	5/28/80	300.00	Ronald Reagan U. S. President ☐ Support ☐ Oppose
Envelopes & Inc.	Printing Services	5/28/80	3663.50	Ronald Reagan U. S. President ☐ Support ☐ Oppose
Park Lane Press	Mailing Service	5/28/80	4810.05	Ronald Reagan U. S. President ☐ Support ☐ Oppose
Thompson & Assoc.	Artwork expenses for mail.	5/28/80	250.00	Ronald Reagan U. S. President ☐ Support ☐ Oppose
Ram Printing & Graphics	Printing Services	5/28/80	1051.44	Ronald Reagan U. S. President ☒ Support ☐ Oppose

(a) SUBTOTAL of Itemized Independent Expenditures . $ _____

(b) SUBTOTAL of Unitemized Independent Expenditures . $ _____

(c) TOTAL Independent Expenditures. $ _____

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_____ _____
Signature Date

Subscribed and sworn to before me this _____ day of _____, 19____

My Commission expires

_____ _____
NOTARY PUBLIC

ITEMIZED INDEPENDENT EXPENDITURES

35b Page 6 of 7 Pages

(See Reverse Side for Instructions)

Name of Committee (in Full)
The Fund for a Conservative Majority

I.D. No
C00001966

Full Name, Mailing Address & ZIP Code of Each Payee	Purpose of Expenditure	Date (month, day, year)	Amount	Name of Federal Candidate supported or opposed by the expenditure & office sought
Smarr Mailing Inc.	Direct Mail Fees	5/28/80	2809.69	Ronald Reagan U. S. President ☒ Support ☐ Oppose
Larry Hunter	Advertisement Exp. for Newspaper	5/28/80	50.00	Ronald Reagan U. S. President ☐ Support ☐ Oppose
Thompson & Assoc.	Newspaper & Radio Advertising Expenses	5/29/80	525.59	Ronald Reagan U. S. President ☐ Support ☐ Oppose
Lloyd Daughtery Route #4 Beavercreek Dr. Powell, TN 37849	Consulting Fee	5/30/80	300.00	Ronald Reagan U. S. President ☐ Support ☐ Oppose
Envelopes Inc.	Printing Services	5/30/80	6518.51	Ronald Reagan U. S. President ☐ Support ☐ Oppose
Poster Art Displays, Inc. 415 Walnut St. Jacksonville, FL 32203	Manuf. of Advertising Materials.	5/30/80	3669.37	Ronald Reagan U. S. President ☒ Support ☐ Oppose

(a) SUBTOTAL of Itemized Independent Expenditures $ _____

(b) SUBTOTAL of Unitemized Independent Expenditures $ _____

(c) TOTAL Independent Expenditures. $ _____

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_____ _____
Signature Date

Subscribed and sworn to before me this _____ day of _____, 19____

My Commission expires _____

_____
NOTARY PUBLIC

ITEMIZED INDEPENDENT EXPENDITURES

36b Page 7 of 7 Pages

(See Reverse Side for Instructions)

Name of Committee (in Full)	I.D. No.
The Fund for a Conservative Majority	C00001966

Full Name, Mailing Address & ZIP Code of Each Payee	Purpose of Expenditure	Date (month, day, year)	Amount	Name of Federal Candidate Supported or Opposed by the Expenditure & Office Sought
Name Exchange	List Rental	5/30/80	6408.28	Ronnld Reagan U. S. President ☒ Support ☐ Oppose
Name Exchange	List Rental	5/27/80	2389.43	Ronnld Reagan U. S. President ☐ Support ☐ Oppose
Bond Office Services	Direct Mail	5/2/80	10,540.00	Ronnld Reagan U. S. President ☐ Support ☐ Oppose
Name Exchange 7015 Old Keene Mill Rd. Springfield, Va. 22150	List Rental	5/7/80	213.20	Ronnld Reagan U. S. President ☐ Support ☐ Oppose
				Ronnld Reagan U. S. President ☒ Support ☐ Oppose
				Ronnld Reagan U. S. President ☒ Support ☐ Oppose

(a) SUBTOTAL of Itemized Independent Expenditures	$	
(b) SUBTOTAL of Unitemized Independent Expenditures	$	
(c) TOTAL Independent Expenditures		$

Under penalty of perjury I certify that the independent expenditures reported herein were not made in cooperation, consultation, concert with or at the request or suggestion of any candidate or any authorized committee or agent of such candidate or authorized committee. Furthermore, these expenditures did not involve the handling of solicitation, distribution or republication in whole or in part of any campaign materials prepared by the candidate, his campaign committees, or their agents.

Signature _____ Date _____

Subscribed and sworn to before me this _____ day of _____, 19____

My Commission expires _____

_____
NOTARY PUBLIC

EXHIBIT 6

38b

CITIZENS FOR REAGAN IN '80
A project of Fund for a Conservative Majority
927 Fifteenth Street, NW
Washington, D.C. 20005

Address Correction Requested. Do not forward.



This communication and all enclosures are paid for by Fund for a Conservative Majority and not by any candidate or candidate's committee.

FCM has helped these Conservative Leaders:
(partial listing)


Gov. Ronald Reagan


Sen. Roger Jepsen


Sen. Jesse Helms


Sen. Bill Armstrong


Sen. John Tower


Sen. Gordon Humphrey


Sen. Strom Thurmond


Cong. Jack Kemp

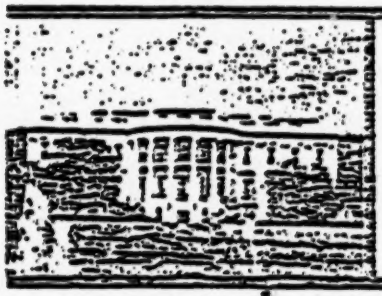

Sen. Orrin Hatch


Cong. Robert Bauman


Cong. Robert Dornan


Cong. John Ashbrook

This communication and all enclosures are paid for by Fund for a Conservative Majority and not authorized by any candidate or candidate's committee.



CITIZENS FOR REAGAN IN '80!

SENATE CONTROL IN '80!



Projects Sponsored By

THE FUND FOR A CONSERVATIVE MAJORITY

FCM

Paid for by Fund for a Conservative Majority; not authorized by any candidate.

Fund for a Conservative Majority (FCM) is one of the oldest conservative political action committees in the country. It was established under the original name Young Americans Campaign Committee several years before the Federal Election Commission came into existence.

Over the years FCM has supported most of the country's conservative leaders. Men like Governor Ronald Reagan; Senators John Tower, Jesse Helms and Orrin Hatch; and Congressmen Jack Kemp, Robert Dornan and Dan Marriott have all been assisted in their elections by this important political action committee.

The Board of Directors of the Fund for a Conservative Majority includes Robert Heckman who also serves as Executive Director of Young Americans for Freedom; Kenneth Boehm, former Prosecuting Attorney and award winning radio personality; and Jeff Kane, a successful businessman in the state of Maine. FCM's Executive Director is Ralph J. Galliano formerly with the National Conservative Political Action Committee.

The Fund for a Conservative Majority is dedicated to the goal of creating a conservative majority in the Congress and of electing a conservative President.

FCM believes a conservative majority in the Senate and a Conservative President can be elected in 1980.

Activities for the 1980 Election

"Senate Control in '80" is one of FCM two current major political campaigns.

Conservatives can win control of the U.S. Senate in 1980. Many of the ultra-Liberals who must face the voters next year are very vulnerable to defeat: Liberal Senators like George McGovern of South Dakota, Gary Hart of Colorado, John Culver of Iowa, Birch Bayh of Indiana, John Durkin of New Hampshire and *at least ten others.*

FCM plans to be very active in this campaign to gain "Senate Control in '80."

* * * * * * * * * * *

"Citizens for Reagan in '80" is a special independent campaign effort to help secure the nomination and election of Ronald Reagan as President of the United States.

"Citizens for Reagan in '80" is working in key primary states such as New Hampshire, Florida, Texas and California, and at the important state conventions of Virginia and Missouri. Mailings, newspaper and radio ads, billboards and other political campaign activities will continue to be sponsored by this independent campaign.



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Citizens for Reagan in 80!

A project of FUND FOR A CONSERVATIVE MAJORITY

May 19, 1980

Dear Mr. [redacted]

Reagan as President and a Conservative Majority in the Senate is truly within our grasp!

National columnist Jack Anderson has referred to this possibility when he recently wrote:

> "... if a conservative Republican should win the presidency next year, his allies in the Senate could help him change the political direction of the country."

<u>With your help we can soon nominate and elect Ronald Reagan as President! And we can control the Senate as well!</u>

"Citizens for Reagan in '80" is a special project of the prominent multi-candidate political action committee -- Fund for a Conservative Majority. FCM is one of the oldest PACs in the country and its efforts have helped elect many of today's conservative leaders.

FCM is seeking to elect conservative candidates to federal office who will actively work to limit the size, price and control of government.

"Citizens for Reagan in '80" can be the deciding factor in electing Ronald Reagan as President of the United States.

If we are to succeed, we need your help. Please join with "Citizens for Reagan in '80" today.

A significant amount of "independent money" has already been raised to help nominate and elect Reagan our next President.

This communication and all enclosures are paid for by Fund for a Conservative Majority and not authorized by any candidate or candidate's committee.

But more, much more, needs to be done.

The Eastern Establishment and the liberal news media hope to deny victory to Ronald Reagan.

We must not allow them to succeed! Reagan can win!

"Citizens for Reagan in '80" is an independant campaign working to nominate and elect Ronald Reagan President of the United States.

Citizens for Reagan will encourage our fellow citizens to vote for Ronald Reagan in 1980.

Citizens for Reagan is campaigning in all the important primary and convention states. However, the extent to which we campaign depends directly upon the amount of support received from you and other patriotic Americans.

Citizens for Reagan budgeted a great deal of money for the important primaries in New Hampshire, the South, Illinois, Connecticut, Pennsylvania and Texas. Now its efforts are focussed on the important final primaries in California, Ohio and New Jersey, on June 3rd.

Radio and newspaper advertising, voter mailings, polling and literature distribution is being carried out by "Citizens for Reagan in '80".

<u>The goal is simple: to nominate and elect Ronald Reagan President of the United States.</u>

Ronald Reagan is a strong, articulate and experienced leader. He proved he was an effective executive while serving as Governor of California.

As a matter of fact, Reagan was the first major spokesman calling for a national "taxpayers revolt" by urging the citizens to join him in bringing government under control.

And Ronald Reagan has clearly understood the Soviet threat and has always called for a superior U.S. military force.

Once Reagan is nominated at the Republican convention, we will not stop our campaign -- no indeed. "Citizens for Reagan in '80" will continue to campaign right up to election day.

As an independant campaign, "Citizens for Reagan in '80" is not bound by the federal law to disband after Ronald Rea-

gan's nomination. However, the only money the official Ronald Reagan campaign will have after his nomination will be that which the Federal Election Commission gives him.

As an independent effort "Citizens for Reagan in '80" has no limit on expenditures before or after the nomination.

Ronald Reagan can win in 1980. But to win he needs your help today.

Jimmy Carter can be defeated in 1980.

And the best man to challenge Jimmy Carter is Ronald Reagan. You and I both know this. Even the liberal news media is beginning to realize that Reagan can win!

Just imagine the Presidential Debates this fall between Reagan and Carter! Or against Ted Kennedy if he should take the nomination from President Carter. Ronald Reagan will so out-class and out-debate Carter or Kennedy that the American people will simply have to vote for our man!

Send your maximum contribution today to the Fund for a Conservative Majority and join "Citizens for Reagan in '80". The campaigns are expensive and we need operational money to help nominate and elect Conservatives to the United States Senate and Ronald Reagan as President of the United States.

And with your participation we can also help decide who Reagan's Vice President will be.

Please join in the national "Reagan's Running Mate Survey" which is enclosed.

Who should Reagan ask to run with him? You can help make [illegible] decision by sending us the enclosed survey as soon as you complete it.

The results of this survey will be periodically released to the news media right up to the Republican National Convention.

Please take these three important steps to help insure Ronald Reagan's nomination and election as President of the United States:

(1) Be sure you and your Reagan friends are registered to vote.

(2) Fill out the enclosed "Reagan's Running Mate Survey" and send it to us today.

(3) Please enclose a maximum contribution with your survey. Make your check payable to Fund for a Conservative Majority.

Don't let the liberal news media and the Eastern Establishment keep us from nominating and electing Ronald Reagan!

Join "Citizens for Reagan in '80" today. Send your maximum contribution just as soon as possible to the Fund for a Conservative Majority.

On November 4, 1980 Ronald Reagan can be elected President of the United States.

On January 20, 1981 Ronald Reagan can be sworn in as the 40th President of the United States!

On January 21, 1981 President Reagan will begin to bring government under control; he will take action to decrease the rate of inflation; and he will begin to build an effective military defense for our country and our allies.

All this can actually happen! But to make sure it does, you must first join "Citizens for Reagan in '80" today.

I am anxiously awaiting your reply.

Sincerely,

Bob Heckman

Robert C. Heckman, Chairman
Fund for a Conservative Majority

P.S. Tens of thousands of dollars must be raised quickly to allow "Citizens for Reagan in '80" to continue to organize in the remaining key primary states and to promote Ronald Reagan at State Republican Conventions around the country.

Please join "Citizens for Reagan in '80" today! Send your completed Vice Presidential survey and your contribution to the Fund for a Conservative Majority.

Paid Political Advertisement

AMERICA NEEDS LEADERSHIP!



America needs Ronald Reagan as President of the United States. At a time when government seems too big and too powerful, we need a man to bring control of government back to the people.

Government deficit spending continues —

Costly regulations add $100 billion each year to the price of goods and services —

Soviet military strength is increasing while America's defense capability is declining —

America cries for a strong, national leader.

Ronald Reagan is the leader America needs in 1980!

JOIN "CITIZENS FOR REAGAN IN '80"!

An independent expenditure campaign by Fund for a Conservative Majority, one of the oldest political action committees in the country.

PLEDGE YOUR SUPPORT!

Send your contribution today!

"Citizens for Reagan in '80"

Count me on the Reagan Team for 1980! I am most happy to join "Citizens for Reagan in '80" and to work to nominate and elect Ronald Reagan President of the United States.

___ $15 ___ $25 ___ $50 ___ $100
___ $500 ___ $1,000 ___ $3,000 ___ Other

(Make Check to: Fund for a Conservative Majority or FCM)

A project of Fund for a Conservative Majority, 927 Fifteenth Street, N.W., Washington, D.C. 20005

Name _____

Address _____

City _____

State _____ Zip _____

Occupation _____

Self-employed? _____

Place of Business _____

This communication and all enclosures are paid for by Fund for a Conservative Majority and not authorized by any candidate or candidate's committee.

Anticipating Carter, Reagan Adds Key Adviser

Reagan Stakes Out Tough Foreign Policy Stand

Reagan's support runs deep and strong

Is Reagan juggernaut gaining speed?

He looks unstoppable

Reagan bulldozer rolls on

U.S. role must win respect: Reagan

Foreign policy stand

How Reagan Can Wi

Reagan a 'formidable' opponent, Carter

Reagan's Campaign in Virginia Gets Big Boost From Ex-Governor Godwin

Dole Declares His Support for Reagan in GOP Race

ck: Ronald Reagan could win

Reagan May Get His Cha

Virginia's Big 3 GOP Office Holde

Carter, Reagan Now Running Neck and Neck



THANKS FOR HELPING US PAY POSTAGE

Citizens for Reagan in '80
A project of:
Fund for a Conservative Majority
927 Fifteenth Street, NW
Washington, D.C. 20005

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This communication and all enclosures are paid for by Fund for a Conservative Majority and not by any candidate or candidate's committee.



Reagan's Running Mate Survey

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Conducted by Citizens for Reagan in '80

(A project of Fund for a Conservative Majority)

Please show your 1st and 2nd choices for the Vice Presidential candidate to run on Ronald Reagan's Ticket.



John CONNALLY _____



Cong. Phil CRANE _____



Cong. Jack KEMP _____



Sen. Jesse HELMS _____



George BUSH _____



Gerald FORD _____



Sen. Pete DOMENICI _____

other _____

YES, I want to join Citizens For Reagan In '80!

Enclosed is my contribution in the amount of:

_____ $15 _____ $25 _____ $50 _____ $100 _____ $250

_____ $500 _____ $1,000 _____ $2,500 _____ $5,000 _____ Other

(Make Check to: Fund for a Conservative Majority or FCM)

All donors of $25 or more will receive this elegant lapel pin. It's guaranteed to be a collector's item within a few short years.



The Fecaral law requires that we ask the following questions:

Occupation _____ Self employed? _____

Place of Business _____

Corporate contributions can be accepted. They should be issued to the order of The Fund for a Conservative Majority — State Fund. These contributions will be utilized only in connection with state and local races where corporate contributions are permitted.

This communication and all enclosures are paid for by Fund for a Conservative Majority and not authorized by any candidate or candidate's committee.

Office-Supreme Court, U.S.
FILED
MAY 11 1981
ROBERT L. STEVAS,
CLERK

Nos. 80-1067 and 80-847

In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

AMERICANS FOR CHANGE, ET AL., APPELLEES.

COMMON CAUSE, ET AL., APPELLANTS,

v.

HARRISON SCHMITT, ET AL., APPELLEES, and
FEDERAL ELECTION COMMISSION,
INTERVENOR-APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

CHARLES N. STEELE *
General Counsel

KATHLEEN IMIG PERKINS
Assistant General Counsel

JEFFREY H. BOWMAN
MIRIAM AGUIAR
SONDRA L. MILLS
Attorneys

Attorneys for Appellant and Intervenor-Appellee Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4143

MICHAEL L. BURACK *
ROGER M. WITTEN
BRUCE E. COOLIDGE
CLIFFORD B. HENDLER
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

JAN W. BARAN *
WILLIAM H. SCHWEITZER
REBECCA L. JACKSON
LEE LEVINE
BAKER AND HOSTETLER
818 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 861-1500

Attorneys for Appellees Americans for Change, Harrison Schmitt and Carl T. Curtis

RODERICK M. HILLS
WILLIAM A. LONG
ROBERT K. BURGESS *
ROBERT B. SHANKS
LATHAM, WATKINS & HILLS
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 828-4400

* Counsel of Record

[Additional Attorneys listed on inside cover]

APPEAL DOCKETED IN NO. 80-1067—DECEMBER 29, 1980
APPEAL DOCKETED IN NO. 80-847 —NOVEMBER 25, 1980
PROBABLE JURISDICTION NOTED FEBRUARY 23, 1981

ARCHIBALD COX
KENNETH J. GUIDO, JR.
ELLEN G. BLOCK
DONALD J. SIMON
COMMON CAUSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1212
Attorneys for Appellants
Common Cause,
David Cohen and
Winifred Long

RALPH K. WINTER
323 Sterling Law Building
127 Wall Street
New Haven, Connecticut 06520
(203) 436-4781
Attorneys for Appellee
Americans for an
Effective Presidency

J. CURTIS HERGE
ROBERT R. SPARKS, JR.*
A. MARK CHRISTOPHER
JOHN R. CLARK, III
SEDAM & HERGE
7600 Old Springhouse Road
McLean, Virginia 22102
(703) 821-1000
Attorneys for Appellee
Fund For A
Conservative Majority

* Counsel of Record

In the Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-1067 and 80-847

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

AMERICANS FOR CHANGE, ET AL., APPELLEES.

COMMON CAUSE, ET AL., APPELLANTS,

v.

HARRISON SCHMITT, ET AL., APPELLEES, and
FEDERAL ELECTION COMMISSION,
INTERVENOR-APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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CHRONOLOGICAL LIST OF DOCKET ENTRIES IN *FEDERAL ELECTION COMMISSION* v. *AMERICANS FOR CHANGE*

United States District Court for the District of Columbia:

July 15, 1980—Complaint; Appearance.

July 15, 1980—Summons (3) and copies (3) of complaint issued Defendant #1 served 7-23-80; Defendant #3 served 7-28-80; Defendant #2 NS 7-21-80.

July 15, 1980—Request by plaintiffs for the convening of a three-judge District Court.

July 17, 1980—Copy of Motion by Intervenor-Plaintiffs, Common Cause, to consolidate related cases and for order imposing expedited procedures.

July 17, 1980—Copy of Request by Intervenor-Pltfs., Common Cause, for immediate status conference before the three-judge District Court.

July 17, 1980—Motion by Intervenor-Plaintiffs, Common Cause, for leave to intervene.

July 17, 1980—Complaint by Intervenor-Plaintiffs, Common Cause, for entry of declaratory and injunctive relief by a three-judge District Court; Exhibits 1 through 6.

July 18, 1980—Copy of affidavit of special process server Paul J. Coleman upon defts. 7-17-80. (orig. filed in CA80-1609).

July 22, 1980—Copy of Order filed 7-21-80 directing that the oppositions to any motions to dismiss shall be filed on or before 7-28-80; opposition to the motion to intervene filed in C.A. 80-1754 shall be filed on or before 7-25-80; opposition to the motion to consolidate filed by Common Cause shall be filed on or before 7-25-80; Common Cause in C.A. 80-1609 & Federal Election Commission C.A. 80-1754 shall file their initial briefs on the merits on or before 8-4-80; reply briefs on the merits shall be filed on or before 8-11-80. John Garrett Penn, J.

July 23, 1980—Summons (1) and copy (1) of complaint issued to defendant #2. Served #2 defendant 7-23-80.

July 23, 1980—Motion [to dismiss] of defendant #2 Americans for an Effective Presidency, memorandum of points and authorities.

July 25, 1980—Opposition of deft. #1 Americans for Change to Motion by pltfs. for expedited answer and review and P & A's.

July 25, 1980—Opposition of Defendant #1, Americans for Change to Motion of Common Cause, etc. for leave to intervene by defendant Americans for Change, memorandum of points and authorities.

July 25, 1980—Memorandum of points and authorities of the Federal Election Commission in opposition to the motion to intervene of Common Cause.

July 25, 1980—Memorandum of Points and Authorities of Americans for an Effective Presidency in Opposition to Motion of Common Cause, David Cohen & Winifred Long for leave to intervene, to consolidate and to impose expedited procedures.

July 25, 1980—Opposition of defendant Fund for a Conservative Majority to Motion of Common Cause, et al., for leave to intervene, memorandum of points and authorities.

July 25, 1980—Opposition by defendant Fund for a Conservative Majority to plaintiff's motion for an expedited answer.

July 25, 1980—Copy of opposition by defendants Americans for Change to motion of Common Cause, etc. to consolidate related cases and for an order imposing expedited procedures of defendants Harrison H. Schmitt, Carl T. Curtis and Americans for Change, memorandum of points and authorities. (orig. 80-1609).

July 25, 1980—Copy of notice to take depositions of The Reagan for President Committee, The Republican National Committee, Stan Huchaby and John Deardourff, attachments A-D. (orig. filed in 80-1609).

July 28, 1980—Order filed 7-28-80 extending time to 7-28-80 for Americans for an Effective Presidency and Fund for a Conservative Majority to file motions to dismiss; opposition to motions to be filed 8-1-80; Common Cause may limit reply to jurisdictional issues. John Garrett Penn, J.

July 29, 1980—Amended notice by pltfs. to take depositions of the Republican National Committee, John Deardourff, The Reagan for President Committee and Stuart Spencer, attachment A, exhibit 1 and 2 attachment B, exhibit 1 and 2; attachment C, exhibit 1; attachment D and E.

July 30, 1980—Copy of Second Amended notice by pltfs. to take depositions of John Deardourff, The Reagan for President Committee, Stuart Spencer, The Republican National Committee and Brad O'Leary, attachments (8). (orig. filed in CA 80-1609)

July 30, 1980—Copy of motion by John Deardourff to quash subpoena duces tecum or for protective order, memorandum of points and authorities. (orig. filed in C.A. 80-1609).

July 30, 1980—Copy of motion by Americans for an Effective Presidency for a protective order staying all discovery, memorandum of points and authorities. (orig. filed in C.A. 80-1609).

July 30, 1980—Copy of written objection by John Deardourff to inspection & copying of any or all documents designated in subpoena duces tecum. (orig. filed in C.A. 80-1609).

July 31, 1980—Order filed 7-29-80 denying motion of plaintiff for expedited discovery. John Garrett Penn, J.

July 31, 1980—Order filed 7-29-80 setting hearing on motion to dismiss on 8-6-80 at 2:00 P.M.; setting hearing on merits on 8-19-80 at 2:00 P.M. John Garrett Penn, J.

July 31, 1980—Motion of defts. Harrison H. Schmitt & Carl T. Curtis and Americans for Change for protective order, memorandum of points and authorities, exhibit A.

July 31, 1980—Motion of defts. Harrison H. Schmitt & Carl T. Curtis and Americans for Change for protective order as to third party discovery, exhibit A.

August 1, 1980—Copy of Memorandum of points and authorities by plaintiffs in opposition to motions for a protective order staying discovery and in support of an order enforcing subpoenas duces tecum. (orig. filed in 80-1609).

August 4, 1980—Copy of motion of Southeastern Legal Foundation for leave to appear as amicus curiae (Exhibit). (orig. filed in 80-1609).

August 4, 1980—Copy of response of Americans for an Effective Presidency and John Deardourff to plaintiffs' memorandum of points and authorities in opposition to motions for a protective order staying discovery and in support of an order enforcing subpoena duces tecum. (orig. filed in 80-1609).

August 4, 1980—Motion of the American Civil Liberties Union Fund of the National Capital Area for leave to participate as amicus curiae, appendix 1 (Exhibit).

August 4, 1980—Motion of defendant #1 Americans for Change to dismiss or, in the alternative, for summary judgment, table of contents, table of authorities, memorandum of points and authorities, statement of material facts.

August 4, 1980—Copy of motion of defendant #3 Fund for a Conservative Majority to dismiss, memorandum of points and authorities. (orig. filed in 80-1609).

August 5, 1980—Motion of Federal Election Commission for summary judgment, table of contents, table of authorities, memorandum of points and authorities, statement of material facts, exhibits #1—26 (In Exhibit Binder).

August 6, 1980—Appearance of Arthur B. Spitzer as counsel for Amicus Curiae American Civil Liberties Union Fund of the National Capital Area (600 Pa. Ave. S.E. Wash. D.C. 20003, tel: 544-1076).

August 6, 1980—Copy of motion by plaintiffs for order enforcing subpoenas duces tecum, memorandum of points and authorities, exhibit 1.

August 6, 1980—Amended table of authorities by defendant Americans for Change to motion to dismiss filed 8-4-80.

August 7, 1980—Designation of the Honorable Edward Allen Tamm, U.S. Circuit Judge and the Honorable Malcolm Richard Wilkey, U.S. Circuit Judge, U.S.C.A., to serve with the Honorable John Garrett Penn, U.S.D.C. Judge as members of a three-judge court to hear and determine this case. J. Skelly Wright, Chief Judge, U.S. Court of Appeals.

August 8, 1980—Copy of letter from defendant #3 in re: typographical errors made in motion to dismiss filed 8-4-80. (orig. filed in CA80-1609).

August 11, 1980—Opposition by defendant #1 Americans for Change to motion of the Federal Election Commission for summary judgment, memorandum of points and authorities, statement of genuine issues.

August 11, 1980—Response of the Federal Election Commission to motions to dismiss and/or for summary judgment, table of contents, table of authorities.

August 11, 1980—Statement of Genuine Issues [brief on the merits, table of contents, table of authorities, request for permission to be heard in open court filed] by defendant #2 Americans for an Effective Presidency.*

August 11, 1980—Motion of deft. #2 Americans for an Effective Presidency for leave to exceed page limitations. (Exhibit).

August 11, 1980—Copy of reply brief of Southeastern Legal Foundation as amicus curiae, table of authorities.

August 12, 1980—Opposition of defendant #3 to plaintiffs' statement of material facts as to which there is no genuine dispute.

August 12, 1980—Copy of reply by defendant #3 to Common Cause's opening brief on the merits and opposition to Federal Election Commission's motion for summary judgment, table of contents, table of authorities, preliminary statement.

August 12, 1980—Amendment by defendant #2 to statement of genuine issues of Americans for an Effective Presidency.

August 14, 1980—Copy of memorandum of points and authorities of intervenor-plaintiffs in opposition to motion to dismiss or, in the alternative, for summary judgment of

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* Documents bracketed were filed by defendant #2 Americans for an Effective Presidency but do not appear on the Court's docket sheets.

defendant, Americans for Change and in opposition to the motion for summary judgment of defendant Americans for an Effective Presidency in No. 80-1609; statement of material facts; affidavit of David Cohen. (orig. filed in C.A. 80-1609).

August 15, 1980—Errata by pltf.

August 18, 1980—Copy of reply brief by plaintiffs on the merits, table of contents, table of authorities.

August 22, 1980—Copy of Order filed 8-19-80 granting permission of Ralph K. Winter to argue for deft. Americans for an Effective Presidency. Penn, J. Wilkey, J. and Tamm, J., U.S.C.A.

August 22, 1980—Copy of Order filed 8-19-80 granting leave to Southeastern Legal Foundation for leave to appear as amicus curiae. Penn, J.; Wilkey, J. and Tamm, J., U.S.C.A.

August 22, 1980—Order filed 8-19-80 granting leave of Court for deft. Americans for an Effective Presidency to file a brief in excess of 35 pages. Penn, J.

August 22, 1980—Brief of defendant #2 Americans for an Effective Presidency on the merits, table of contents, table of authorities, request for permission to be heard in open court, statement of material facts, exhibit 1 and 2.*

August 22, 1980—Motions of plaintiffs for declaratory judgment and permanent injunction heard and taken under advisement. Penn, J.; Wilkey, J.; Tamm, J., U.S.C.A.

August 28, 1980—Order granting motion of ACLU Fund of National Capital Area for leave to participate as amicus curiae; denying motion of Common Cause to intervene; denying motion of plaintiff for summary judgment; granting motions of defendants for summary judgment; denying all other pending motions. (N) Penn, J., Wilkey, J., Tamm, J.

September 11, 1980—Transcript of proceedings of 8-19-80; pages 1-78 (Rep. Judith M. McGinn) Court Copy (filed in CA80-1754).

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* See August 11, 1980 entry.

September 26, 1980—Copy of Order of 9-25-80 consolidating C.A. 80-1609 with C.A. 80-1754. Tamm, J., U.S.C.A.; Wilkey J., U.S.C.A.; Penn, J., U.S.D.C.

September 26, 1980—Notice of appeal to the Supreme Court by Common Cause, David Cohen and Winifred Long from denial of 8-28-80.

October 1, 1980—Memorandum and Order filed 9-30-80 denying motion of Federal Election Commission for summary judgment; granting motion of political committees and individuals for summary judgment dismissing Count I of complaint brought by Common Cause as moot; dismissing Count II of complaint for lack of jurisdiction. Wilkey, J., U.S.C.A.; Tamm, J., U.S.C.A.; Penn, J., U.S.D.C.

October 3, 1980—Copy of amended notice of appeal to the Supreme Court of the United States by Common Cause, David Cohen and Winifred Long.

October 8, 1980—Copy of Notice of Appeal to the Supreme Court of the United States by plaintiff Federal Election Commission.

February 24, 1981—Certified copy of Order of the U.S. Supreme Court filed 2-23-81 noting probable jurisdiction and consolidating the case with No. 80-1067 *FEC* v. *Americans for Change, et al.* and allotting a total of one hour for oral argument. (orig. filed in C.A. 80-1609).

CHRONOLOGICAL LIST OF DOCKET ENTRIES IN *COMMON CAUSE* v. *HARRISON SCHMITT*

United States District Court for the District of Columbia:

July 1, 1980—Complaint, appearance.

July 1, 1980—Request of pltffs. for the convening of a Three-Judge District Court.

July 1, 1980—Motion of pltffs. for an immediate hearing on pltffs. motion for an expedited schedule.

July 1, 1980—Request of pltffs. for an expedited discovery and briefing schedule; points and authorities.

July 1, 1980—Request of pltffs. to deft. Carl T. Curtis for production of documents.

July 1, 1980—Request of pltff. to deft. Harrison Schmitt for production of documents.

July 1, 1980—Request of pltff. to deft. Americans for Change for production of documents.

July 1, 1980—Interrogatories by pltffs. to deft. Americans for Change.

July 1, 1980—Request for order appointing special process server and order appointing Sandra Bisbey to serve summons and complaint upon defts.

July 1, 1980—Summons (3) and copies (3) of complaint issued.

July 7, 1980—Compilation of the Federal Election Campaign Act and the Presidential Election Campaign Fund Act published by the Federal Election Commission.

July 7, 1980—Opposition by defts. to pltfs. motion for expedited discovery, briefing schedule and response to request for the convening of a three-judge District Court; points and authorities.

July 8, 1980—Reply by pltfs. to defts. opposition to expedited discovery and briefing schedule and convening of a three-judge District Court.

July 8, 1980—Affidavit of service of Sandra Bisbey to serve Summons and Complaint upon Harrison Schmitt.

July 8, 1980—Affidavit of service of Sandra Bisbey to serve Summons and Complaint upon Carl T. Curtis.

July 8, 1980—Affidavit of service of Sandra Bisbey to serve Summons and Complaint upon Americans for Change.

July 8, 1980—Motion of pltf. for expedited discovery, taken under advisement. Motion for Three Judge Court, taken under advisement. Defts. are to file opposition by close of business 7-21-80. (Rep: Tammie Leppo) Penn, J.

July 9, 1980—Letter dated 7-9-80 from Michael L. Burack, Counsel for pltfs., to James Davey, Clerk, U.S.D.C. re: service of reply on defts. counsel on July 8, 1980 at 10:40 a.m.

July 10, 1980—Response by defts. to pltfs. letter profer concerning the constitutionality of 26 U.S.C. § 9012(f).

July 10, 1980—Supplement by defts. to opposition to pltfs. motion for expedited discovery and briefing schedule and response to request for the convening of a three-judge district court.

July 11, 1980—Motion of Federal Election Commission for leave to intervene; points and authorities.

July 16, 1980—Designation of the Honorable Edward Allen Tamm, United States Circuit Judge and the Honorable Malcolm Richard Wilkey, Circuit Judges, United States Court of Appeals for the District of Columbia Circuit, to serve with the Honorable John Garrett Penn, United States District Judge, as members of a three judge court to hear and determine this case. J. Skelly Wright, Acting Chief Judge, U.S.C.A.

July 17, 1980—Amended complaint by plaintiffs adding Americans for an Effective Presidency and Fund for a Conservative Majority; Exhibits (4).

July 17, 1980—Request for order appointing special process server and order appointing Paul Coleman to serve summons and complaint on defts. Americans for an Effective Presidency and Fund for a Conservative Majority.

July 17, 1980—Summons (2) and copies (2) of amended complaint issued.

July 17, 1980—Interrogatories by pltffs. to deft. Fund for a Conservative Majority; Attachment; exhibit.

July 17, 1980—Request by pltffs. to deft. Fund for a Conservative Majority for production of documents; Attachment; Exhibit.

July 17, 1980—Request by pltffs. to deft. Americans for an Effective Presidency for production of documents; attachments; Exhibit.

July 17, 1980—Interrogatories by pltffs. to deft. Americans for an Effective Presidency; attachment; Exhibit.

July 17, 1980—Motion of Common Cause, David Cohen and Winifred Long to consolidate related cases and for order imposing expedited procedures.

July 17, 1980—Request by pltffs. for immediate status conference before the Three-Judge District Court.

July 17, 1980—Affidavit of special process server of service of summons on deft. Americans for an Effective Presidency on 7/17/80.

July 17, 1980—Affidavit of special process server of service of summons on deft. Fund for a Conservative Majority on 7/17/80.

July 21, 1980—Motion of applicant intervenor to dismiss; points and authorities; table of contents; points and authorities.

July 21, 1980—Motion of defendants Harrison H. Schmitt, Carl T. Curtis and Americans for Change; table of authorities; points and authorities.

July 21, 1980—Response of defendants to motion for leave to intervene.

July 21, 1980—Order directing that the oppositions to any motion to dismiss shall be filed on or before July 28, 1980; opposition to the motion to intervene filed in C.A. 80-1754 be filed on or before July 25, 1980; opposition to the motion

to consolidate filed by Common Cause in C.A. 80-1609 and Federal Election Commission in C.A. 80-1754 shall file their initial briefs on the merits on or before August 4, 1980; reply briefs on the merits shall be filed on or before August 11, 1980. Penn. J.

July 23, 1980—Motion to dismiss of defendant Americans for an Effective Presidency; points and authorities.

July 25, 1980—Opposition by defendants to motion of Common Cause, etc. to consolidate related cases and for an order imposing expedited procedures on defendants; points and authorities.

July 25, 1980—Memorandum of points and authorities of defendant Americans for an Effective Presidency in Opposition to motion of plaintiffs to consolidate and impose expedited procedures.

July 25, 1980—Response of the Federal Election Commission to the motion of Common Cause, et al. to consolidate the cases of *Common Cause, et al.* v. *Schmitt, et al.*, C.A. 80-1609 and *Federal Election Commission* v. *Americans for Change, et al.*, C.A. 80-1754.

July 25, 1980—Notice by pltfs. to take deposition of the Reagan for President Committee, The Republican National Committee, Stan Huckaby, and John Deardourff; Attachment A, A Exhibit 1-2, Attachment B, B Exhibit 1-2, Attachment C, C Exhibit 1-2, Attachment D thru E.

July 25, 1980—Notice by pltfs. to take deposition of Harrison Schmitt.

July 28, 1980—Motion of Fund for a Conservative Majority to dismiss; points and authorities.

July 28, 1980—Opposition of plaintiffs to motions to dismiss; table of contents; attachments.

July 28, 1980—Order filed 7-28-80 extending time to 7-28-80 for Americans for an Effective Presidency and Fund for a Conservative Majority to file motions to dismiss; opposition to motions to be filed 8-1-80; Common Cause may limit reply to jurisdictional issues. Penn, J.

July 29, 1980—Amended notice by pltffs. to take deposition of The Republican National Committee, John Deardourff, The Reagan for President Committee and Stuart Spencer; attachments.

July 30, 1980—Second amended notice by pltffs. to take depositions of John Deardourff, The Reagan for President Committee, Stuart Spencer, The Republican National Committee, Brad O'Leary; Attachments.

July 30, 1980—Motion by Americans for an Effective Presidency for a protective order staying all discovery; P&A's.

July 30, 1980—Written objection by John Deardourff to inspection and copying of any or all documents designated in subpoena duces tecum.

July 30, 1980—Motion by John Deardourff to quash subpoena duces tecum or for protective order; P&A's.

July 30, 1980—Motion of defts. Harrison H. Schmitt, Carl T. Curtis and Americans for Change for protective order; P&A's.

July 30, 1980—Motion of defts. Harrison H. Schmitt, Carl T. Curtis and Americans for Change for protective order as to third party discovery; P&A's.

July 31, 1980—Order filed 7-29-80 denying motion of plaintiff for expedited discovery. Penn, J.

July 31, 1980—Order filed 7-29-80 setting hearing on motion to dismiss on 8-6-80 at 2:00 P.M.; setting hearing on merits on 8-19-80 at 2:00 p.m. Penn. J.

July 31, 1980—Opposition of plaintiffs to motions to dismiss filed by defendants Americans for an Effective Presidency and Fund for a Conservative Majority.

August 1, 1980—Memorandum of points and authorities of plaintiffs in opposition to motions for a protective order staying discovery and in support of an order enforcing subpoena duces tecum.

August 4, 1980—Response of Americans for an Effective Presidency and John Deardourff to plaintiffs' memorandum of points and authorities in opposition to motions for a protective order staying discovery and in support of an order enforcing subpoena duces tecum.

August 4, 1980—Motion by non-parties to quash subpoenas duces tecum; points and authorities; table of contents; points and authorities Exhibits (4).

August 4, 1980—Motion of Southeastern Legal Foundation for leave to appear as Amicus Curiae; Exhibit (Brief).

August 4, 1980—Motion of Fund for a Conservative Majority to dismiss; points and authorities.

August 4, 1980—Appearance of Philip A. Lacovara as counsel for Amicus Curiae American Civil Liberties Union Fund of the National Capital Area. (1660 L St., N.W. (20036)—862-7400)

August 4, 1980—Reply of defendants #1, 2, 3 to Common Cause's opposition to motion to dismiss for change.

August 4, 1980—Motion of pltffs. for leave to exceed page limitations; Exhibit (Opening brief)

August 4, 1980—Motion of the American Civil Liberties Union Fund of the National Capital Area for leave to participate as amicus curiae memorandum; Exhibit (points and authorities).

August 6, 1980—Motion of pltffs. for order enforcing subpoena duces tecum; P&A's; Exhibit.

August 6, 1980—Appearance of Arthur B. Spitzer as counsel for Amicus Curiae American Civil Liberties Union Fund of the National Capital Area. (Arthur B. Spitzer—600 Penn. Ave., S.E. Wash., D.C. 544-1076)

August 6, 1980—Order filed 8-5-80 granting motion of Federal Election Commission to intervene as party defendant; directing intervenor defendant to file motion to dismiss by 7-21-80, nunc pro tunc 7-18-80. Penn, J.

August 6, 1980—Order filed 8-5-80 staying discovery noticed by plaintiffs Common Cause, David Cohen and Winifred Long pending ruling on motions for protective order. Penn, J.

August 7, 1980—Order filed 8/6/80 granting leave to pltffs. to file an opening brief in excess of 35 pages.

August 8, 1980—Opening brief by plaintiffs on the merits; attachment.

August 8, 1980—Letter dated 8/8/80 from Robert R. Sparks, Jr. re typographical errors that appear on pages 6 and 8 of motion to dismiss deft. Fund for a Conservative Majority filed 8/4/80.

August 11, 1980—Motion of Americans for an Effective Presidency for leave to exceed page limitations; Exhibit (brief).

August 11, 1980—Request for defendant AEP for permission to be heard in open court; statement of material facts; Exhibits.

August 11, 1980—Reply brief of Southeastern Legal Foundation as Amicus Curiae; table of authorities.

August 12, 1980—Reply of defendant Fund for a Conservative Majority to Common Cause's opening brief on the merits and opposition to Federal Election Commission's motion for summary judgment; table of contents.

August 14, 1980—Memorandum of plaintiffs of points and authorities in opposition to motion to dismiss or, in the alternative, for summary judgment of defendant Americans for Change in No. 80-1754 and in Opposition to the motion for summary judgment of defendants Americans for an Effective Presidency in No. 80-1609; statement of material facts; affidavit of David Cohen.

August 18, 1980—Reply brief of plaintiffs on the merits; table of contents; table of authorities.

August 19, 1980—Motion of plaintiffs for declaratory judgment and permanent injunction heard and taken under advisement. Tamm, J., U.S.C.A.; Wilkey, J., U.S.C.A.; Penn, J., U.S.D.C.

August 20, 1980—Order filed 8-19-80 granting leave to Southeastern Legal Foundation for leave to appear as amicus curiae. Wilkey, J., U.S.C.A.; Tamm, J., U.S.C.A.; Penn, J., U.S.D.C.

August 21, 1980—Order filed 8/19/80 granting permission of Ralph K. Winter to argue for deft. Americans for an Effective Presidency. Tamm, J., USCA, Wilkey, J., USCA, Penn, J., USDC.

August 21, 1980—Order filed 8-19-80 granting motion of American Civil Liberties Union Fund of the National Capital Area for leave to participate as amicus curiae; directing Clerk to file memorandum of points and authorities submitted with motion. Wilkey, J., U.S.C.A.; Tamm, J., U.S.C.A.; Penn, J., U.S.D.C.

August 21, 1980—Order filed 8/19/80 granting leave to pltfs. to file a brief in excess of 35 pages. Wilkey, J., USCA, Tamm, J., USCA, Penn, J., USDC.

August 22, 1980—Memorandum of points and authorities of the American Civil Liberties Union Fund of the National Capital Area, Amicus Curiae.

August 22, 1980—Brief of Southeastern Legal Foundation as Amicus Curiae.

August 28, 1980—Order denying motion of plaintiff to consolidate case with C.A. 80-1754 granting motion of defendants to dismiss; dismissing complaint denying motions of defendant for protective order; denying all other pending motions. Tamm, J., U.S.C.A.; Wilkey, J., U.S.C.A.; Penn, J., U.S.D.C.

September 11, 1980—Transcript of Proceedings of August 19, 1980. Pages 1 through 78; Reporter: Judith M. McGinn; Court Copy.

September 26, 1980—Notice of appeal by plaintiffs from Order of 8-28-80 to the Supreme Court of the United States; copies mailed to the Honorable Wade McCree; Charles N. Steele, Jan Baran, Roderick M. Hills, Paul D. Kamenar and Robert R. Sparks, Jr.

September 29, 1980—Order filed 9-25-80 consolidating C.A. 81-1609 with C.A. 80-1754. Tamm, J., U.S.C.A.; Wilkey, J., U.S.C.A.; Penn, J., U.S.D.C.

September 30, 1980—Memorandum and Order denying motion of Federal Election Commission for summary judgment; granting motion of political committees and individuals for summary judgment; dismissing Count I of complaint brought by Common Cause as moot; dismissing Count II of complaint for lack of jurisdiction. Wilkey, J., U.S.C.A.; Tamm, J., U.S.C.A.; Penn, J., U.S.D.C.

October 3, 1980—Amended notice of appeal to the Supreme Court of the United States by plaintiffs.

October 8, 1980—Notice of appeal by defendants Federal Election Commission to the Supreme Court from order entered 8-28-80.

December 5, 1980—Transcript of proceedings, 7/8/80; courts copy; pages 1-27; Rep: T. Leppo.

February 9, 1980—Transcript of Proceedings, 8/6/80; pages 1-56 Rep: James M. Turner; Court Copy.

February 24, 1981—Certified copy of order of the United States Supreme Court filed 2-23-81 noting probable jurisdiction and consolidating the case with 80-1067 *FEC* v. *Americans for Change, et al.* and allotting a total of one hour for oral argument.

LIST OF RELEVANT DOCUMENTS
WHICH HAVE BEEN REPRODUCED IN THE APPENDICES
TO APPELLANTS' JURISDICTIONAL STATEMENTS
FILED WITH THE COURT, RULE 30.1

	FEC App.	CC App.
District Court opinion in C.A. Nos. 80-1609, 80-1754	App. A at 1a	App. A at 1a
District Court Order in No. 80-1754	App. B at 35a	App. C at 33a
District Court Order in No. 80-1609		App. B at 31a
District Court Order to Consolidate Nos. 80-1609 and 80-1754	App. C at 37a	App. F at 37a
Notice of Appeal in No. 80-1609		App. D at 35a
Notice of Appeal in Nos. 80-1754, 80-1609	App. D at 38a	App. E at 36a
Amended Notice of Appeal in Nos. 80-1754, 80-1609		App. G at 39a
Supreme Court Order Granting Extension of Time	App. E at 42a	
Presidential Election Campaign Fund Act, 26 U.S.C. ch. 95		App. H at 41a
Complaint in No. 80-1754	App. F at 43a	
Amended Complaint in No. 80-1609		App. I at 69a
Exhibits to Amended Complaint (Lodged Separately)		App. (Supp.)

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
Washington, D.C. 20543

Charles N. Steele, Esq.
General Counsel
Federal Elections Commission
1325 K Street, N.W.
Washington, D.C. 20463

February 23, 1981

RE: Common Cause, et al. v. Harrison Schmitt, et al., No. 80-847; and Federal Election Commission v. Americans for Change, et al. No. 80-1067

Dear Mr. Burack:

The Court today took the following action in the above cases:

"In these cases probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument."

Enclosed are memorandums describing the time requirements and procedures under the rules.

Very truly yours,

ALEXANDER L. STEVAS
Clerk

/s/ By June M. Hoffmann
(Miss) JUNE M. HOFFMANN
Assistant Clerk

Enclosures

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 346555 326

Office-Supreme Court, U.S.
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JAN 26 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-847 and 80-1067

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMON CAUSE, ET AL., *Appellants,*

v.

HARRISON SCHMITT, ET AL., *Appellees.*

FEDERAL ELECTION COMMISSION, *Appellant,*

v.

AMERICANS FOR CHANGE, ET AL., *Appellees.*

On Appeal From the United States District Court for the District of Columbia

MOTION TO DISMISS OR AFFIRM

RALPH K. WINTER
323 Sterling Law Building
127 Wall Street
New Haven, Conn. 06520
(203) 436-4781

RODERICK M. HILLS
WILLIAM A. LONG
ROBERT K. BURGESS *
ROBERT B. SHANKS
EDWARD SONNENSCHEIN, JR.
LATHAM, WATKINS & HILLS
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 828-4400

Attorneys for Appellee
AMERICANS FOR AN
EFFECTIVE PRESIDENCY

* *Counsel of Record*

January 26, 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether the three-judge court of the United States District Court for the District of Columbia correctly concluded, on the basis of this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), that a provision of the Presidential Election Campaign Fund Act imposing a $1,000 ceiling on independent expenditures which further the election of the presidential candidate by political committees other than a candidate's authorized committee, violates the First Amendment guarantees of freedom of speech and association.*

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* In addition to the parties named in the caption, the other parties to the proceeding below were Americans for an Effective Presidency, on whose behalf this Motion to Dismiss or Affirm is submitted, David Cohen, Winifred Long, Carl T. Curtis, and Fund for a Conservative Majority.

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Pub. L. No. 93-443 §§403-405	3
88 Stat. 1263 (1974)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-847 and 80-1067

COMMON CAUSE, ET AL., *Appellants,*

v.

HARRISON SCHMITT, ET AL., *Appellees.*

FEDERAL ELECTION COMMISSION, *Appellant,*

v.

AMERICANS FOR CHANGE, ET AL., *Appellees.*

On Appeal From the United States District Court for the District of Columbia

MOTION TO DISMISS OR AFFIRM

Appellee Americans for an Effective Presidency moves the Court to dismiss the appeal herein on the ground that the cause does not present a substantial federal question or, in the alternative, to affirm the judgment of the United States District Court for the District of Columbia.

OPINION BELOW

The September 30, 1980 opinion of the three-judge district court, which is not yet officially reported, appears as Appendix A to the Jurisdictional Statement filed by the Federal Election Commission in No. 80-1067.[1]

[1] Citations to this and other materials in the Appendixes to the Federal Election Commission's Jurisdictional Statement are given as "FEC App. _____ at _____."

JURISDICTION

At appellants' request, a three-judge district court was convened pursuant to 26 U.S.C. §9011(b) to "implement or construe" 26 U.S.C. §9012(f), a section of the Federal Election Campaign Fund Act, 26 U.S.C. §9001 *et seq.* On August 28, 1980, the three-judge court granted appellees' motions for summary judgment, and on September 30, 1980, the court issued its opinion holding §9012(f) unconstitutional based on this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). Jurisdiction is conferred by 26 U.S.C. §9011(b) and 28 U.S.C §§1252 and 2101.[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly . . . .

26 U.S.C. §9012(f) provides:

> (f) Unauthorized expenditures and contributions.
>
> (1) Except as provided in paragraph (2), it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an

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[2] Both appellees and the Federal Election Commission ("FEC" or "Commission") contested Common Cause's standing and argued that the FEC had primary jurisdiction to hear Common Cause's complaint.

authorized committee of such candidates, in an aggregate amount exceeding $1,000.

(2) This subsection shall not apply to —

(A) expenditures by a broadcaster regulated by the Federal Communications Commission, or by a periodical publication, in reporting the news or in taking editorial positions, or

(B) expenditures by any organization described in section 501(c) of this title which is exempt from tax under section 501(a) of this title in communicating to its members the views of that organization.

(3) Any political committee which violates paragraph (1) shall be fined not more than $5,000, and any officer or member of such committee who knowingly and willfully consents to such violation and any other individual who knowingly and willfully violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than one year, or both.

STATEMENT OF THE CASE

A. The Statutory Framework.

In 1971, the 92nd Congress sought to regulate campaign financing by enacting two statutes: the Federal Election Campaign Act, 2 U.S.C. §431 *et seq.* ("FECA"), and the Presidential Election Campaign Fund Act, 26 U.S.C. §9001 *et seq.* ("the Fund Act"). This scheme was amended in 1974, when Congress added contribution and expenditure limitations to FECA, added automatic appropriations to the federal election fund and established the amount of the candidates' entitlement. The Federal Election Commission was made responsible for administering the fund. Pub. L. No. 93-443, §§403-405, 88 Stat. 1263 (1974).

Through FECA, as amended, Congress placed limits on the amount of money individuals and groups could contribute to candidates for federal elections and to political committees, and ceilings on the total expenditures permitted in support of such candidates from any source—the candidates themselves, their offical organizations, and other supporters not part of the official campaigns. Specifically, FECA limited expenditures independent of a candidate's campaign to $1,000. This limit applied to all federal campaigns, including presidential campaigns.

The Fund Act was enacted as subtitle H of the Internal Revenue Code and provided for a presidential election campaign fund financed by a taxpayer check-off system. Under this Act, major party candidates who satisfy the Act's eligibility requirements may elect to receive payments from public funds to defray their "qualified campaign expenses," including expenses incurred by the presidential candidate and his running mate or by any of their authorized committees.[3] In order to receive public financing, candidates for President and Vice President must agree that they, and their authorized committees, will be bound by restrictions on contributions and on the amount of qualified campaign expenses they incur, 26 U.S.C. §§9002(4) and 9003, including the requirements that they not incur aggregate expenses in excess of the public payment and not accept private contributions to defray campaign expenses.[4] 26 U.S.C

[3] The term "authorized committee" is defined by the Fund Act to mean any political committee which is authorized in writing by a candidate to further his election. 26 U.S.C. §9002(1).

[4] National party committees affiliated with a candidate, however, may spend an amount equal to two cents times the voting age population of the United States. 2 U.S.C. §441a(d)(2).

§9003(b). The result of the candidate's agreeing to abide by statutory limits on expenditures and by the prohibition on contributions is to forbid all expenditures by individuals and groups in coordination with the candidate's campaign. This result is brought about by the statutory definition of contribution, which includes coordinated expenditures. 2 U.S.C. §441a(a)(7)(B). The right of the candidate to choose to forego coordinated expenditures by supporters and the attendant restriction on the political activities of such supporters was upheld in *Republican Nat'l Committee* v. *Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), 616 F.2d 1 (2d Cir.) (en banc) (per curiam), *aff'd summarily*, 445 U.S. 955 (1980).

Section 9012(f) of the Fund Act, 26 U.S.C. §9012(f), the section at issue here, restricts expenditures by political committees that are not "authorized committees" of candidates for President or Vice President. Such committees are prohibited from making "expenditures" in excess of $1,000 "to further the election" of any candidate for President or Vice President who has elected to receive public funding under the Fund Act.

Public financing for presidential campaigns first became available in the 1976 general election. 26 U.S.C. §9013. However, in that year, this Court held, among other things, in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), that FECA's ceilings on expenditures independent of a candidate's campaign, including presidential campaigns, were unconstitutional. *Id.* at 12-59. Although §9012(f) was not specifically before the Court in *Buckley*, the Court held that independent campaign expenditures are at the very core of protected speech and associational activity and that statutory limits on the amounts which individual citizens or groups can expend on independent

communications in political campaigns are an impermissible restraint on First Amendment freedoms.

B. The Facts Giving Rise to These Cases.

Ronald Reagan, the 1980 Republican presidential candidate, opted for public financing under the Fund Act. The Reagan campaign and its authorized political committees (other than the Republican National Committee) were therefore prohibited from accepting private contributions or from spending more than the amount of the public grant.

Appellees Americans for an Effective Presidency ("AEP"), Americans for Change ("AFC") and Fund for a Conservative Majority ("FCM") are political committees within the meaning of the Fund Act.[5] Each sought to mount a fund raising and advertising campaign in support of the candidacies of Ronald Reagan for President and of various other candidates for public office. None of the appellees is an "authorized committee" of Ronald Reagan, and all operated independently of the Reagan campaign.[6]

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[5] Each of the appellee organizations registered with the FEC as a "political committee," defined by the Fund Act as

> "any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office." 26 U.S.C. §9002(9).

[6] The FEC has never alleged that appellees' activities were not independent of the Reagan campaign. Common Cause originally alleged in Count II of its Amended Complaint that appellees were not in fact independent of the Reagan campaign, but this count was dismissed by the district court on jurisdictional grounds and for failure to state a claim for relief, as stated in parts V. A and V. B of

The relevant facts before the district court were undisputed. Appellees solicited contributions from individuals who favored Ronald Reagan for President.[7] Appellees' literature and solicitation materials detailed their support for Ronald Reagan and other candidates and outlined their intention to spend the sums collected to publicize their support for such candidates. The money raised was used to engage professional media and political consultants, to purchase advertisements, and generally to publicize their political views before the November election.

C. The Proceedings Below.

On July 1, 1980, Common Cause filed a complaint against AFC and its Chairman and Treasurer. Count I of the complaint alleged that AFC's political activities, even though independent and not associated with the Reagan campaign, violated 26 U.S.C. §9012(f)'s $1,000 ceiling on independent expenditures by political committees. Count II of the complaint alleged that AFC was in fact not independent of the official Reagan campaign and that AFC's receipts and expenditures were therefore contributions to, or expenditures by, the Reagan campaign, thereby violating the Fund Act's restrictions on contributions and expenditures. The complaint sought declaratory and injunctive relief. It requested that a

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the court's opinion. FEC App. A at 28a-32a. Common Cause has not appealed from this dismissal. Common Cause Jurisdictional Statement at 6, n.7. Thus, for the purposes of this appeal, all parties assume *arguendo* that the expenditures of AFC, AEP and FCM were made independently of the official Reagan campaign. *Id.*

[7] Contributions to appellee committees were subject to the $5,000 contribution limitation imposed by §441a of FECA.

three-judge court be convened and that the action be expedited pursuant to 26 U.S.C. §9011(b). Common Cause also moved for immediate discovery against AFC.

On July 15, 1980, the FEC filed an action against AFC, AEP and FCM contending that appellees' independent political activities violated §9012(f)'s restriction on expenditures by political committees in excess of $1,000 and seeking declaratory relief, including a declaration that §9012(f) was constitutional.

On July 17, 1980, Common Cause filed an amended complaint adding appellees AEP and FCM as defendants. It then moved to consolidate the two actions and to intervene as plaintiff in the FEC's action.

Appellees moved for dismissal or, in the alternative, for summary judgment in both actions on the ground, among others, that the restrictions imposed by §9012(f) on independent expenditures by political committees are unconstitutional under this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). The appellees and the FEC also sought to dismiss Common Cause's action on the grounds that Common Cause lacked standing to sue to enforce the Fund Act and that the three-judge court was without jurisdiction to hear its claim.

A three-judge district court was convened on July 17, 1980 pursuant to appellants' request for expedited treatment under §9011(b). The court stayed all discovery and set briefing and argument schedules on appellees' motions for dismissal and summary judgment and the jurisdictional issue. On August 28, 1980, the court issued orders granting appellees' motions for summary judgment in the FEC's action and dismissing Count I of Common Cause's action on the basis of the court's disposition of the Commission's case. Count II of Com-

mon Cause's action was dismissed for lack of jurisdiction and failure to state a claim. FEC App. B. Common Cause is not appealing the district court's dismissal of this count.

On September 25, 1980 the district court issued an order consolidating the two cases. FEC App. C. On September 30, 1980, the court issued its opinion, authored by Judge Wilkey. FEC App. A.

D. The Opinion of the Three-Judge Court.

The three-judge district court based its analysis of §9012(f) squarely on this Court's decision in *Buckley* v. *Valeo, supra.*

The court initially concluded that §9012(f) could be interpreted only as a broad prohibition against "*all* expenditures over $1,000 by political committees, including 'independent expenditures.' " FEC App. A. at 7a (emphasis in original).[8]

Utilizing the *Buckley* analysis, the district court carefully weighed the governmental interests allegedly served by §9012(f)'s $1,000 limit on independent expenditures by groups and the resultant impact on political speech and associational activity. It concluded that the proposed spending by appellee committees constituted independent expenditures constitutionally protected under *Buckley*. Consequently, it held §9012(f) facially unconstitutional. *Id.* at 15a-16a.[9]

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[8] Defendants Schmitt, Curtis, and Americans for Change had argued that §9012(f) could be interpreted as prohibiting only coordinated expenditures authorized or requested by a candidate.

[9] Contrary to appellants' assertions, the district court had no need to rest its decision on any facts peculiar to these cases. The so-called "factual" findings to which appellants refer are merely

ARGUMENT

THE CONSTITUTIONAL ISSUES RAISED BY PLAINTIFFS WERE FULLY LITIGATED AND DETERMINED BY THIS COURT IN *BUCKLEY* v. *VALEO* AND SHOULD NOT BE REHEARD AT THIS TIME.

Two propositions were established by this Court in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), and are dispositive of the constitutional issues raised by this appeal. Those propositions are: (1) expenditures for the purpose of furthering the election of a candidate for federal office are political speech protected by the First Amendment; (2) there is no compelling governmental interest justifying the regulation of such expenditures where they are independent of, and not coordinated with, the candidate's campaign. These propositions were recently reaffirmed in *Republican Nat'l Committee* v. *Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), 616 F.2d 1 (2nd Cir.)(en banc)(per curiam), *aff'd summarily,* 445 U.S. 955 (1980), which held that limits on expenditures coordinated with the campaign of a publicly financed candidate are permissible only because the candidate's supporters are free to make unlimited independent expenditures. This appeal seeks to relitigate these well settled propositions.

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observations by the court, common to First Amendment analysis, regarding such subjects as the restrictions of the statute, the importance of groups in the political process, and the importance of money for effective political speech. The court's opinion is no more based on factual findings than this Court's decision in *Buckley*, *supra*. *See, e.g.*, the Court's discussion at 424 U.S. 19-20, 47, *quoted infra* at 14-15. Moreover, no factual discussion was necessary because §9012(f) is unconstitutional both on its face and as applied to appellees' proposed expenditures.

A. Independent Political Expenditures Are Protected Speech At The Core Of The First Amendment And At The Heart Of A Free Political Process

In *Buckley, supra,* this Court flatly and unequivocally held that expenditures during a campaign for purposes of political communication are at the core of the First Amendment. The Court stated:

> "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." 424 U.S. at 19.

Because the Fund Act and FECA prohibit all coordinated expenditures by groups or individuals which are not financed by a publicly funded presidential candidate's national campaign committee or by the local party organization, the right of citizens to engage in any effective political communication in presidential campaigns is at stake in this case. Citizens interested in publicizing a viewpoint about the candidates in a presidential campaign cannot do so effectively unless they are free to purchase and use the resources necessary for political communication. If the appellants' view of

§9012(f) is upheld, any group of citizens will be limited to expenditures of under $1,000 unless the national campaign committee provides the money or the resources are within the severely limited class which may be supported by the local party organization and, further, are purchased and made available to the citizens group by that organization.[10] In either case, the right of the group to engage in the particular political communication is conditioned upon receiving the formal sanction of the campaign or party organization. A right to speak which is contingent upon receiving permission from someone else who may forbid or censor the speech is no right at all.

The danger here is not hypothetical. National campaign committees have their own priorities which will by no means emphasize the funding of citizens groups. This was made clear by the court in *Republican Nat'l Committee, supra,* which found that the expenditure limitations associated with public funding had resulted in greatly diminished grass roots activities in presidential elections. 487 F. Supp. 286.

The centrality of the conduct at stake here to a free political process is dramatically underlined by Common Cause's complaint which alleges irreparable injury to the plaintiffs in that the defendants may, unless restrained,

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[10] The term "expenditure" does not include "payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party . . . ." 2 U.S.C. §431(9)(B)(viii). Nor does it include payment by a State or local committee of a political party of "the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President or Vice President . . . ." *Id.* §431(9)(B)(ix).

induce persons to vote for Mr. Reagan. Free societies ought not regard the results of peaceful, political persuasion as a legally cognizable injury.

B. *Buckley* Specifically Held There Is No Compelling Interest Justifying A Limitation On Independent Expenditures

Buckley, supra, rejected both the equalization of campaign resources and the control of escalating campaign spending as governmental interests sufficient to justify limits on campaign expenditures, whether coordinated or independent. This Court stated:

> "The interest in equalizing the financial resources of candidates competing for federal office is no more convincing a justification for restricting the scope of federal election campaigns. Given the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support. There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate . . . .
>
> The campaign expenditure ceilings appear to be designed primarily to serve the governmental interests in reducing the allegedly skyrocketing costs of political campaigns . . . . [T]he mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people — in-

> dividually as citizens and candidates and collectively as associations and political committees — who must retain control over the quantity and range of debate on public issues in a political campaign." 424 U.S. at 56-57.

It was also argued in *Buckley, supra*, as it is argued here, that independent expenditures can be limited by statute because, like direct contributions to candidates, they may have, or appear to have, a corruptive influence on the electoral process. In rejecting that argument, this Court noted:

> "Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, §608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse." 424 U.S. at 47.

Moreover, the Court specifically found that a $1,000 expenditure limitation in federal elections is nothing short of a complete prohibition on speech. Based on the fact — all the more true today — that "television, radio, and other mass media for news and information [are] expensive modes of communication [and] indispensible instruments of effective political speech," the Court held that a $1,000 expenditure ceiling

> "would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communciation." 424 U.S. at 19-20.

In a footnote to this passage, the Court underlined this conclusion by noting that "as of January 1, 1975, one full-page advertisement in a daily edition of a certain metropolitan newspaper cost $6,971.04 . . . ." *Id.*, n. 20.

Accordingly, the Court held that independent expenditure ceilings "heavily burden core First Amendment expression . . ." and that they are not justified by any compelling governmental interest. The Court concluded:

> "Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." 424 U.S. at 48.

Neither the Common Cause plaintiffs nor the Commission has offered a governmental interest of substance which was not argued and rejected in *Buckley, supra.* If anything, the interests argued in *Buckley* were stronger, for the statutory provision at issue there, former §608(e)(1) of the FECA, prohibited independent expenditures in excess of $1,000 by individuals as well as political committees. Section 9012(f), on the other hand, imposes no limit on independent expenditures by individuals. As a consequence, §9012(f) leaves wealthy individuals free to make unlimited independent expenditures. In contrast, organizations seeking to facilitate the pooling of resources by small donors are severely restricted. This relative enhancement of political communication by the wealthy is inconsistent with appellants' own theories of the purposes served by this statute. *See* FEC Jurisdictional Statement at 9-10.

Finally, appellants seek to justify this draconian restriction on political communication by wrapping it in the mantle of public financing. But a limitation on independent expenditures is neither an indispensable nor

even an appropriate adjunct to the public financing provisions. To the contrary, the freedom to make unlimited independent expenditures is essential to the constitutionality of that statutory scheme.

At issue in *Republican Nat'l Committee, supra*, was the constitutionality of public financing and its accompanying prohibition on coordinated expenditures by individuals or groups, no matter how small. The court there explicitly stated:

> "We similarly conclude that the limitations [on coordinated expenditures by groups or individuals] do not abridge the rights of supporters. The plaintiffs have shown that the effect of the public funding alternative is to decrease the importance of 'grass roots' political activity compared to privately financed campaigns. Private individuals are unable to make expenditures coordinated with the campaign organizations, such as renting vans to distribute literature, paying the cost of photocopying and distributing campaign materials received from the candidate's organization . . . . On the other hand, supporters are left with a wide range of ways to express their support . . . . *Most important, uncoordinated expenditures are permitted without limit. Limitations on uncoordinated expenditures were held unconstitutional in Buckley* v. *Valeo* . . . ." 487 F. Supp. at 286 (emphasis added).

The constitutionality of the public financing scheme thus rests squarely on the right to make unlimited independent expenditures. The power of the candidate to choose to prevent activities by supporters extends only to expenditures coordinated with the candidate's campaign.[11]

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[11] As the court noted:

> ". . . [I]t would be unreasonable to preclude a candidate who prefers public financing from using it instead of private financ-

C. Section 9012(f) Is *A Fortiori* Unconstitutional

The limitation on independent expenditures before this Court in *Buckley, supra*, former §608(e)(1), read:

> "No person may make any expenditure (other than an expenditure made by or on behalf of a candidate within the meaning of subsection (c)(2)(B)) relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000."

Compared to §9012(f), that provision is a paradigm of a carefully drafted statute, tailored to a discernible congressional purpose. Whereas §608(e)(1) was limited to expenditures for speech explicitly advocating or attacking an identified candidate, §9012(f) merely requires that it "further" the election of a candidate and fall within the definition of "qualified campaign expense." If §9012(f) reaches independent expenditures, it must impact on issue discussion as well as explicit candidate advocacy. In the recent election, for example, Mr. Carter strongly supported the SALT II agreement while Mr. Reagan opposed it. A group of individuals sharing the cost of a full page newspaper advertisement in late October extolling the virtures of SALT II would fall within §9012(f)'s proscriptions. Political activists who purchased such ads could hardly claim indifference to the outcome of the presidential election or deny that the ad might "further" Mr. Carter's chances. That the candidates were not mentioned is irrelevant, since the expenditure would have

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ing merely because some supporters believe that the decision deprives them of the ability to contribute to the candidate's election in the precise way they would if the campaign were privately financed." 487 F. Supp. 280 at 286.

been a "qualified campaign expense" if made by the Carter campaign itself.

The broad proscription of §9012(f), if upheld, will chill other kinds of political activities. For example, in the recent election, groups opposing the candidacy of Congressman Anderson might reasonably fear that independent expenditures opposing his election would be viewed as "furthering" the election of Mr. Carter. Indeed, as appellant Long acknowledges in her allegations, this lawsuit itself was intended to prevent people from being persuaded to vote for Mr. Reagan; consequently, this lawsuit was intended to "further" Mr. Carter's candidacy.[12]

In contrast to former §608(e)(1) of FECA, therefore, §9012(f) is not limited to explicit candidate advocacy but prohibits a wide variety of political activities, including those of issue groups. If the narrow provisions of §608(e)(1) cannot survive constitutional scrutiny, the virtually unlimited proscriptions of §9012(f) are an *a fortiori* case of unconstitutional overbreadth.[13]

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[12] The potential of §9012(f) to chill effective political speech is further illustrated in this case by the fact that the Carter/Mondale Presidential Committee, Inc. sent a letter to hundreds of broadcasters the day after Common Cause filed its Amended Complaint advising them of the Common Cause lawsuit and of the FEC's action. The letter cautioned the broadcasters that purchasing of broadcasting time by appellee committees raised "serious legal questions." The letter threatened litigation before "courts and federal agencies" if the stations allowed appellees to purchase advertising time.

This letter was an exhibit before the three-judge court and is included as Appendix A to this Motion.

[13] Contrary to the assertion of the Common Cause appellants, discovery into the structure and operation of the appellees would add nothing relevant. If §9012(f) reaches independent expenditures,

The only limiting language in §9012(f), the restriction to "political committees," does not reduce its constitutional vulnerability. First, *Buckley, supra*, specifically held that the First Amendment protected independent expenditures by persons both individually and collectively in groups, associations, or political committees. 424 U.S. at 39, 40, 57. Indeed, a fundamental reason for invalidating §608(e)(1) was that

> "the Act's $1,000 limitation on independent expenditures 'relative to a clearly identified candidate' *precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association*. 424 U.S. at 22 (emphasis added).

Second, §9012(f) strengthens the political hand of individuals wealthy enough to bear the costs of effective political communication and disadvantages the less wealthy, whose only effective political expression lies in collective efforts. While a person with $20,000 to purchase a television advertisement is perfectly free to do so, someone who wants to contribute $10 to a committee for the purpose of placing the same advertisement is effectively stopped by §9012(f), which prohibits the ad. This is, as the district court found, without constitutional foundation. *See Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966); *Police Department* v. *Mosley*, 408 U.S. 92 (1972).[14]

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it does so as to "any" political committee, not just those selected by Common Cause as defendants. Whether its limit on such expenditures is *facially* constitutional, therefore, does not depend in any way on the nature of these particular defendants.

[14] The exclusion of expenditures by broadcasters, publications, and "501(c)" organizations is also a constitutionally vulnerable distinction, as the three-judge court noted. FEC App. A at 25a, n. 43.

Appellants are well aware that §9012(f)'s pervasive proscriptions on political speech and associational activity render it constitutionally vulnerable. Their briefs thus seek to limit its impact to groups which are professionally assisted and receive contributions and to exclude "informal groups." This interpretation is not based on statutory language, legislative history, administrative ruling, commission regulation, judicial precedent or on any other criterion utilized by lawyers. It is cut from whole cloth, to be used in this case only.

If §9012(f) prohibits independent expenditures, it applies to *all* groups which make the proscribed expenditures, whether those involved know each other personally, whether they be managed by the most skillful political operative or the most disoriented activist, whether they raise their funds by direct mail or by personal appeal over a backyard fence. There is no such category as "informal group" in election law. Any "informal group" would fall within the term "any committee, association, or organization . . . ." 26 U.S.C. §9002(9). Indeed, the concept of "informal group" espoused by appellants would make a shambles of the major provisions of FECA, for such groups would escape the limit on the size of contributions made to "political committees." 2 U.S.C. §441a(a)(2)(C).

CONCLUSION

Appellee Americans for an Effective Presidency respectfully submits that the questions presented by appellants' Jurisdictional Statements are not substantial federal questions and therefore moves the Court to dismiss the appeals, or, in the alternative, to affirm the judgment entered by the United States District Court for the District of Columbia.

Respectfully submitted,

RALPH K. WINTER
323 Sterling Law Building
127 Wall Street
New Haven, Connecticut 06520
(203) 436-4781

RODERICK M. HILLS
WILLIAM A. LONG
ROBERT K. BURGESS*
ROBERT B. SHANKS
EDWARD SONNENSCHEIN, JR.
LATHAM, WATKINS & HILLS
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 828-4400

Attorneys For Appellee
AMERICANS FOR AN
EFFECTIVE PRESIDENCY

**Counsel of Record*

January 26, 1981

APPENDIX

CARTER/MONDALE PRESIDENTIAL COMMITTEE, INC.
1413 K Street, N.W., Washington, D.C. 20005
(202) 789-7200

July 18, 1980

ROBERT S. STRAUSS, CHAIRMAN
TIM KRAFT, NATIONAL CAMPAIGN MANAGER
S. LEE KLING, TREASURER
EVAN S. DOBELLE, NATIONAL FINANCE CHAIRMAN

Dear Broadcaster:

It has come to the attention of the Carter/Mondale Reelection Committee, Inc. that allegedly "independent" supporters of Ronald Regan's campaign plan massive purchases of broadcasting time to air highly controversial spots, containing attacks on either the President, other leading Democrats, or the Democratic Party generally. The Wall Street Journal, for example, reported on June 19, 1980, page 1, that groups identified as "Americans for Change," "Citizens for Reagan in '80," "Americans for Reagan," and "The Ronald Reagan Victory Fund" are among those which intend to spend over $50 million to try to influence the outcome of the November election. (See also the attached New York Times editorial and a recent Associated Press article on the commericals [sic] apparently already being distributed by one of the groups.)*

The Carter/Mondale Reelection Committee, Inc., the official and authorized campaign committee for President Carter, and the Democratic National Committee have filed a complaint with the Federal Election Commission against these so-called "independent groups", the Reagan for President Committee, and others alleging that the Federal Election Campaign Act will be violated if the Republican nominees receive public funding of their campaign while at the same time receiving massive support from alleged "independent" backers.

In addition, a lawsuit was recently filed by Common Cause against one of these groups challenging its independent status and charging that the proposed expenditures in support

* Attachments to the letter have not been reproduced in this Appendix.

of Reagan's candidacy will seriously distort and undermine the plan for public financing of Presidential election campaigns enacted by Congress in 1974. Finally, the Federal Election Commission this week has filed its own action seeking a judicial ruling that would have the effect of prohibiting these groups from making their planned multi-million dollar expenditures while the Reagan campaign is also accepting more than $29 million in taxpayer funds. These cases are pending in the Federal District Court in Washington, D.C. We are confident that these proceedings will establish that such groups are not permitted under the law to make such expenditures on behalf of a presidential candidate who also is receiving public financing. Further, we believe that it will be determined that the particular committees in question and their organizers are not, and cannot be, truly independent of the Reagan campaign.

However, in either event, the purchase of broadcasting time by the so-called "independent" groups under such circumstances raises serious legal questions which you should consider.

Even if some or all of these groups are deemed legally capable of making independent expenditures for Reagan as a matter of federal election law:

*They are not entitled to the reasonable access provision of Section 312(a)(7) of the Communications Act.

*The broadcast of programs dealing with controversial issues of public importance paid for by such "independent" groups may obligate you, under the FCC's Fairness Doctrine to provide time without charge for the broadcast of opposing viewpoints.

*Any such program which constitutes a personal attack will obligate you, under the FCC rules, to notify the person or persons attacked and to offer them a free opportunity to respond.

*To the extent any such program involves a "political use" by a qualified candidate within the meaning of Section 315(a) of the Communications Act, you will be required to offer equal time to all other legally qualified

candidates, and, to the extent that the political use was without cost to the candidate whose candidacy was promoted in the broadcast, you would be required to offer free time to all other legally qualified candidates. See Letter to Hon. Mike Monroney, 40 F.C.C. 251 (1952).

If, as claimed in the actions mentioned above, the groups in question are found to be acting in concert with the Reagan for President Committee or otherwise ineligible for the making of "independent expenditures," then:

*The purchase by them of broadcast time may involve serious violations of law that could potentially involve a participating station in litigation before courts and federal agencies.

*The purchase of time by such groups would obligate a station to provide equal opportunities to all opposing candidates and their affiliated supporters.

As is apparent from this letter, we believe that expenditures, by allegedly independent backers of one candidate, of massive funds for the purchase of broadcast time to influence the result of the Presidential Election in favor of that candidate is a direct threat to the delicately balanced system of campaign spending limitations and public financing mandated by Congress for the conduct of Presidential elections.

We hope you will give careful consideration to the problems inherent in use of the broadcast media for these purposes and, if you have any questions, we urge you to consult with your counsel before accepting requests for the purchase of political broadcast time by any group which is not the official, authorized committee of a qualified candidate.

Sincerely,

/s/ TIMOTHY G. SMITH
Timothy G. Smith
General Counsel

cc: Federal Communications Commission

Attachments

TGS:jm

Nos. 80-847 and 80-1067

Office-Supreme Court, U.S.
FILED
JAN 26 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-847

COMMON CAUSE, *et al.*,

Appellants,

v.

HARRISON SCHMITT, *et al.*,

Appellees.

No. 80-1067

FEDERAL ELECTION COMMISSION,

Appellant,

v.

AMERICANS FOR CHANGE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM OR TO DISMISS

JAN W. BARAN
WILLIAM H. SCHWEITZER
REBECCA L. JACKSON
LEE LEVINE
BAKER & HOSTETLER
818 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 861-1500

Attorneys for Appellees Americans for Change, Harrison H. Schmitt and Carl T. Curtis.

Washington, D.C. • THIEL PRESS • (202) 638-4521

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Nos. 80-847 and 80-1067

IN THE

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OCTOBER TERM, 1980

No. 80-847

COMMON CAUSE, *et al.*,

Appellants,

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HARRISON SCHMITT, *et al.*,

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FEDERAL ELECTION COMMISSION,

Appellant,

v.

AMERICANS FOR CHANGE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM OR TO DISMISS

Appellees Harrison H. Schmitt, Carl T. Curtis and Americans for Change (hereinafter collectively referred to as "AFC") move the Court to affirm the judgments of the three-judge United States District Court for the District of Columbia in Nos. 80-847 & 80-1067 on the

ground that it is manifest that the questions on which the decision in the case depends are so well-settled as to need no further argument. Alternatively, appellee AFC moves the Court to dismiss the appeal of Common Cause, *et. al*, No. 80-847, on the grounds that 26 U.S.C. §9011(b) does not authorize their cause of action and Common Cause and other appellants in No. 80-847 lack standing to prosecute the subject appeal.*

STATEMENT OF THE CASE

A. Statutory Scheme

Presidential general election campaigns are governed by the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§431-55 (1976 & Supp. III 1979) and the Presidential Campaign Fund Act ("Fund Act"), 26 U.S.C. §§9001-9013 (1976 & Supp. III 1979).[1] The Fund Act provides for the public funding of general presidential and vice-presidential election campaigns through the Presidential Election Campaign Fund which is financed by a voluntary taxpayer check-off system. Presidential and vice presidential candidates of a political party who satisfy the requirements of 26 U.S.C. §9003 can elect to receive payments from the Fund to defray campaign expenses incurred by the candidates or their authorized committees. 26 U.S.C. §9012(c); *see* 26 U.S.C.

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*In addition to the parties named in the caption, the other parties to the proceedings below were David Cohen, Winifred Long, Carl T. Curtis, Americans for an Effective Presidency, and Fund for a Conservative Majority. The alignment of the parties is set forth at pages 3-6. The American Civil Liberties Union and the Southeastern Legal Foundation filed briefs *amicus curiae* in support of defendants AFC, Fund for a Conservative Majority and Americans for an Effective Presidency.

[1]Except as otherwise noted, all citations relating to FECA will be to the current version, as amended, and to 2 U.S.C. All citations to the Fund Act will be to the current version, as amended, and to 26 U.S.C.

§9002(11) (definition of qualified campaign expense). The FEC has exclusive jurisdiction over enforcement of the Fund Act. 2 U.S.C. §437c(b)(1).

Section 9012(f) of the Fund Act, which the three-judge district court found unconstitutional,[2] prohibits unauthorized political committees[3] from making independent expenditures[4] in excess of $1,000 to further the election of the candidates. *FEC v. AFC* at 6a. A political committee which violates §9012(f) is subject to criminal penalties. 26 U.S.C. §9012(f)(3).

Section 9011(b) of the Fund Act authorizes the FEC, the national committee of any political party and individuals eligible to vote for President to institute actions "as may be appropriate to implement or construe" provisions of the Fund Act. Actions which are appropriate under §9011(b) are adjudicated by three-judge district courts on an expedited basis. 26 U.S.C. §9011(b).

B. The Proceedings Below

Appellee AFC is a political committee registered with the FEC pursuant to 2 U.S.C. §433.[5] Appellees Ameri-

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[2] FEC v. Americans for Change, Nos. 80-1609 & 80-1754, at 1a (D.D.C. Sept. 30, 1980) (three-judge court) [hereinafter cited as *FEC v. AFC* with page citations to Appendix of Common Cause].

[3] The Fund Act does not define an "unauthorized committee." The Federal Election Commission ("FEC") has specified that "[a]n 'unauthorized committee' is a political committee which has not been authorized in writing by a candidate to solicit or receive contributions or make expenditures on behalf of such candidate." 11 C.F.R. §100.5(f)(2) (1980). All political committees subject to federal campaign financing laws are either "authorized" or "unauthorized." *Id.*

[4] "Independent expenditures" is defined at 2 U.S.C. §431(17) and by the FEC in its regulations at 11 C.F.R. §109.1(a) (1980).

[5] Harrison H. Schmitt and Carl T. Curtis are the Chairman and Treasurer, respectively, of AFC.

cans for an Effective Presidency ("AEP") and Fund for A Conservative Majority ("FCM") are also political committees. *FEC v. AFC* at 3a. During the presidential election campaign, AFC raised money by means of limited contributions from individuals and other political committees in accordance with FECA, 2 U.S.C. §441a. *Id.* AFC made independent expenditures in support of candidates for federal offices during the 1980 general election campaign including independent expenditures in support of Ronald Reagan and George Bush, the Republican candidates for the offices of President and Vice President. *Id.* at 3a-4a.

On July 1, 1980 Common Cause, David Cohen and Winifred Long (hereinafter collectively referred to as "Common Cause") sued AFC seeking an order declaring that AFC violated 26 U.S.C. §9012(f) and enjoining defendants from making expenditures in support of Ronald Reagan's candidacy.[6]

On July 15, 1980 the FEC moved to intervene in the Common Cause action and filed a separate complaint against AFC and two other political committees, AEP and FCM. The FEC complaint sought a declaration that §9012(f) prohibited expenditures, including independent expenditures, in excess of $1,000 by unauthorized political committees in support of a candidate who

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[6]Count I of Common Cause's complaint alleged that AFC's activities, even if independent of the official Reagan campaign, violated §9012(f). Count II alleged that AFC was not independent of the official Reagan campaign and, as a result, its expenditures were contributions to the official Reagan campaign in violation of the Fund Act. Common Cause did not appeal the judgment of the three-judge court that the court lacked subject matter jurisdiction over Count II. Jurisdictional Statement, Common Cause v. Schmitt, at 10 n. 15.

financed his campaign under the Fund Act. Common Cause moved to intervene as party plaintiff in the FEC action and to consolidate both cases.[7]

The FEC intervened in the Common Cause action and, along with AFC, moved for dismissal on the ground that the three-judge court lacked subject matter jurisdiction. AFC and the FEC opposed Common Cause's motion to intervene in the FEC action.

AFC, along with AEP and FCM, moved for summary judgment in the FEC action. AFC argued that §9012(f) could be saved from constitutional infirmity by construing it to permit independent expenditures but to prohibit political committees from making expenditures requested or authorized by the candidate or his committees. Alternatively, AFC, along with AEP and FCM, argued that §9012(f) is unconstitutional under the First Amendment.

On August 28, 1980 the three-judge court granted judgment for appellees in the FEC action, dismissed Count I of Common Cause's amended complaint on the basis of the ruling in the FEC action and dismissed Count II for lack of subject matter jurisdiction. FEC's motion for summary judgment was denied. Common Cause's motion to intervene in the FEC action and to consolidate the cases was denied as were all other motions pending in the Common Cause action.

On September 24, 1980 the three-judge district court ordered the cases consolidated. The opinion of the court was issued on September 30, 1980. The court decided that §9012(f) is unconstitutional under the First Amend-

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[7]Common Cause amended its complaint to add AEP and FCM as defendants.

ment and the decisions of this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Republican National Committee v. Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *aff'd*, 445 U.S. 955 (1980). *See FEC v. AFC* at 14a-24a.

Both the FEC and Common Cause noticed appeals. Common Cause filed its jurisdictional statement on November 25, 1980. It asked this Court to reverse summarily the ruling below and remand Count I for further development of the factual record or, alternatively, to grant full briefing on the merits. The FEC's jurisdictional statement asks the Court to note jurisdiction in this appeal, receive briefs on the merits and hear oral argument.

ARGUMENT

I.

THE THREE-JUDGE COURT CORRECTLY CONCLUDED THAT SECTION 9012(f) IS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT

The three-judge court held that 26 U.S.C. §9012(f) prohibits "*all* expenditures over $1,000 by political committees which further a presidential candidate's election." *FEC v. AFC* at 7a. Such a limitation on expenditures not coordinated with the candidate or his authorized campaign committees constitutes an unconstitutional abridgement of the freedoms of speech and association guaranteed by the First Amendment. *Id.* at 24a. The judgment below, which is based on and mandated by this Court's decisions in *Buckley v. Valeo*[8] and *Republican National Committee v. Federal Election*

[8] 424 U.S. 1 (1976).

Commission,[9] is correct as a matter of law. This Court should grant appellee AFC's motion to affirm.

Limitations on political expenditures affect core First Amendment rights of political expression and association and must be subject to exacting scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976); *FEC v. AFC* at 10a. This Court has already held that a $1,000 limit on independent political expenditures by individuals or groups cannot withstand such scrutiny. *Buckley, supra*, 424 U.S. at 51; *Republican National Committee, supra*, 487 F. Supp. at 286. The FEC in effect seeks to relitigate and overturn a principle of constitutional law that was settled by *Buckley* and reaffirmed by *Republican National Committee.*

A limit on uncoordinated "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate[10] for federal office"[11] is unconstitutional. *Buckley, supra*, 424 U.S. at 44, 51. Such a limitation is unconstitutional as applied to any "person,"[12] including a committee or an association. *Id.* at 39-40 n.45; *FEC v. AFC* at 12a. This Court has rejected every governmental interest advanced in support of limits on independent political expression. *Buckley, supra*, 424 U.S. at 44-51; *FEC v. AFC* at 11a; *see ACLU*

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[9] 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *aff'd*, 445 U.S. 955 (1980).

[10] "Candidate" is an individual who seeks nomination for election, or re-election to federal office. 2 U.S.C. §431(2).

[11] "Federal office" includes the offices of President and Vice President. 2 U.S.C. §431(3).

[12] "Person" includes "an individual, partnership, committee, *association*, corporation, or any other organization or group of persons." 2 U.S.C. §431(11) (emphasis added).

v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom. Staats v. ACLU*, 422 U.S. 1030 (1975).

The FEC argues that expenditures by political committees pose "the risk that presidential candidates may become, or even appear to be, beholden to these private benefactors." Jurisdictional Statement, *FEC v. AFC*, at 13. While expenditures made in coordination with the candidate raise the possibility of a corrupt *quid pro quo* arrangement and are therefore limited, *Buckley, supra*, 424 U.S. at 46; *FEC v. AFC* at 19a, the independent expenditure limits at issue here "redress only tangentially the corruption problem" and cannot be imposed in a manner consistent with the First Amendment. *Id.* at 11a (citing *Buckley, supra*, 424 U.S. at 45). An uncoordinated expenditure can damage a political campaign and is often not welcome by the candidate, reducing significantly the likelihood of an implicit *quid pro quo*. *Buckley, supra*, 424 U.S. at 45-46.

The FEC asserts that the unconstitutionality of §9012(f) somehow undermines the legality of public funding itself. *See* Jurisdictional Statement, *FEC v. AFC*, at 3-8. As the court below recognized, however, "the restrictions associated with public funding (*e.g.*, no private contributions, expenditure ceilings, etc.) are permissible only because the rights of supporters are left untouched." *FEC v. AFC* at 13a (citing *Republican National Committee, supra*, 487 F. Supp. at 286). In addition, the legislative history makes clear that "[w]hile independent expenditures pose a difficult question, it should be emphasized that *the need to control them does not arise from public financing.*" S. Rep. No. 93-689, 93d Cong., 2d Sess. 18, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 114 (1977) (emphasis in original).

The First Amendment guarantees the right of citizens "to associate with others for the common advancement of political beliefs and ideas." *Buckley, supra,* 424 U.S. at 15 (citing *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973); *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975)). As this Court has noted:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and *collectively as associations and political committees*—who must retain control over the quantity and range of debate on public issues in a political campaign.

Budkley, supra, 424 U.S. at 57 (emphasis added). This Court has "emphasized that free expression may not be limited on the basis of the 'identity of its source, whether corporation, *association*, union or individual.' " *FEC v. AFC* at 21a (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)).

The First Amendment protects politically effective associations.[13] "Effective advocacy of both public and

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[13]The FEC incorrectly confuses independent *expenditures by* political committees with individual *contributions to* political committees. *See* Jurisdictional Statement, FEC v. AFC, at 26-27. The latter are limited under 2 U.S.C. §441a(a)(1)(C) and are not at issue in this case. *See* California Medical Ass'n v. FEC, No. 79-4426 (9th Cir. May 23, 1980), *review pending*, 49 U.S.L.W. 3207 (U.S. Oct. 7, 1980) (No. 79-1952). Section 9012(f) restricts independent expenditures by political committees which are fully protected by the First Amendment. Buckley, *supra*, 424 U.S. at 44-45; FEC v. AFC at 12a. The FEC contends that independent expenditures by political committees are entitled to little First Amendment

[footnote continued]

private points of view, particularly controversial ones, is undeniably enhanced by group association." *Buckley, supra,* 424 U.S. at 15 (citing *NAACP v. Alabama,* 357 U.S. 449, 460 (1958)). As the court below noted, "political committees pool money from individuals who are interested in politics and amplify their shared viewpoint into an efficient political message." *FEC v. AFC* at 16a. In *Buckley* this Court struck down the $1,000 limit on independent expenditures because a limitation on independent political expression

> precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of freedom of association. . . . *[C]onstraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression "is simultaneously an interference with the freedom of [their] adherents."*

424 U.S. at 22-23 (citations omitted) (emphasis added).[14] For identical reasons, the three-judge court held that the

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protection because "political professionals" are entrusted with responsibility for making these expenditures on behalf of individual contributors. Jurisdictional Statement, FEC v. AFC, at 13. Political committees, even those operated by "political professionals," are entitled to no less First Amendment protection than wealthy individuals, who have a constitutional right to make unlimited expenditures on behalf of presidential candidates. *See* FEC v. AFC at 22a; Buckley, *supra,* 424 U.S. at 49. In fact, if §9012(f) "were not struck down, individuals of modest means would have no right to join with others to state their views to the public with some force." FEC v. AFC at 22a.

[14]This Court specifically envisioned the formation and operation under the campaign financing laws of "well-financed groups, who would remain free to spend unlimited sums directly to promote candidates and policies they favor in an effort to persuade voters." Buckley, *supra,* 424 U.S. at 26 n. 26. Moreover,

[footnote continued]

constraints in §9012(f) must be struck down as unconstitutional. This Court should affirm the judgment of the court below.

II.

THE COURT SHOULD AFFIRM THE JUDGMENT OF THE THREE-JUDGE COURT DISMISSING THE COMPLAINT OF COMMON CAUSE, OR ALTERNATIVELY, DISMISS THE APPEAL OF COMMON CAUSE

The three-judge court correctly concluded that §9012(f) is unconstitutional and its dismissal of the complaint of Common Cause in No. 80-847 should be affirmed. In the alternative, the Court should find that §9011(b) does not authorize Common Cause's complaint or that Common Cause lacks standing to bring such a claim or pursue this appeal.[15]

A. Section 9011(b) Does Not Authorize Common Cause's Complaint.

Count I of Common Cause's complaint seeks a declaration that AFC and other political committees violated §9012(f), a criminal statute, by making independent expenditures in support of President Reagan's candidacy. Count I further requests the Court to enjoin AFC from violating the Fund Act. Common Cause, a

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contributors remain free to become "member[s] of any political association and to assist personally in the association's efforts on behalf of candidates." *Id.* at 22. Political associations simultaneously were left free "to aggregate large sums of money to promote effective advocacy." *Id.*

[15]The court below found that it lacked subject matter jurisdiction under §9011(b) over Count II of Common Cause's complaint. FEC v. AFC at 26a. The court acknowledged that the issue of whether §9011(b) authorized Count I remained unresolved. FEC v. AFC at 25a.

private entity, is suing other private parties to enjoin allegedly criminal activities under the Fund Act. As a result, Common Cause is seeking civil enforcement of the Fund Act.

Congress has provided the FEC with exclusive jurisdiction over civil enforcement of the federal election laws, including the Fund Act.[16] *FEC v. AFC* at 25a-26a. The FEC moved to dismiss Counts I and II on the basis that Common Cause was "bring[ing] an enforcement action in the guise of a suit to implement or construe the statute." *FEC v. AFC* at 28a n.54. While the court below did not reach the issue in relation to Count I, it recognized that "the FEC's enforcement jurisdiction has recently been vindicated," and claims of "violations of the election laws must first be brought before the FEC as within that agency's exclusive jurisdiction." *FEC v. AFC* at 28a-29a.[17] Count I, like Count II, is within the exclusive jurisdiction of the FEC.

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[16] 2 U.S.C. §437c(b)(1) ("The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.")

[17] FECA provides a carefully drafted statutory scheme by which a private person can obtain such enforcement. 2 U.S.C. §437g. Section 437g(a) directs that any person who believes a violation of the Fund Act has occurred may file a complaint with the FEC. The FEC must then notify the respondent, investigate the complaint, determine whether a violation has occurred and attempt to obtain a conciliation agreement. *Id.* §437g(a)(2)-(5). Throughout the investigative and conciliation stages, the respondent is entitled to confidential treatment of all information and proceedings. *Id.* §437g(a)(12). If an agreement cannot be obtained, the FEC may seek injunctive and other relief in federal district court. *Id.* §437g(a)(6). If the FEC dismisses or fails to act on a complaint, the complainant may file an action in federal district court. *Id.* §437g(a)(8). The district court may direct the FEC to reinstitute the complaint and proceedings under §437g.

Section 9011(b) provides that the FEC, the "national committee of any political party and individuals eligible to vote for President are authorized to institute such actions . . . as may be appropriate to implement or construe any provisions" of the Fund Act.[18] The statute does not expressly provide that one private party has the right to sue another private party to enjoin alleged violations of the Fund Act. Any inference of a private cause of action not expressly authorized by a statute "must be consistent with the evident legislative intent and of course, with the effectuation of the purposes intended to be served by the [statute]." *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 418 (1975) (quoting *Passenger Corp. v. Passengers Association*, 414 U.S. 453, 457-58 (1974)).

The legislative history of the Fund Act and FECA, in conjunction with the purposes of both statutes, demonstrates that §9011(b) should not be read to create a right on the part of one private party to sue another private party to remedy alleged Fund Act violations.

In 1971, when the Fund Act was passed, the FEC did not exist. There was no agency with the duty or requisite powers to enforce administratively the federal election laws.[19] However, in 1974 Congress created the FEC and gave it primary jurisdiction over civil enforcement of

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[18]Since the organization Common Cause is not one of the entities listed in §9011(b), it does not have standing in any event to proceed under §9011(b).

[19]The Department of Justice could use its general prosecutorial powers to prosecute actions in district court for violations of the Fund Act. It had and has no authority to conduct administrative proceedings under the Fund Act.

FECA. Pub. L. No. 93-443, §310, 88 Stat. 1280 (1974). In reconstituting the FEC after *Buckley*, Congress in 1976 amended the FEC's primary jurisdiction to make it exclusive; this exclusive jurisdiction encompassed civil enforcement of the Fund Act. FECA Amendments of 1976, Pub. L. No. 94-283, §101, 90 Stat. 476 (1976).[20]

FECA's mechanism for enforcement of private complaints ensures that the federal election laws cannot be

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[20]The House report stated:

> *In addition to centralizing civil enforcement authority in the Commission, the bill takes one additional step to limit unjustifiable litigation burdens that might otherwise be imposed on the courts and on individuals against whom a complaint has been filed.*
>
> * * * * *
>
> The phrase *"exclusive primary jurisdiction" used to describe the congressional intent to centralize the civil enforcement of the Act in the Federal Election Commission* is taken from the Supreme Court's decisions in *San Diego Unions v. Garmon*, 359 U.S. 236. There the Court recognized that Congress, in enacting the National Labor Relations Act, "entrusted administration of the labor policy for the nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." (Garmon, 359 U.S. at 242). On that basis the Court stated that all complaints bottomed on an alleged violation of the NLRA are within that Agency's "exclusive competence" (*id.* at 245) and that all other tribunals must therefore "yield to the primary jurisdiction of the National Board" (*id.*) *The Court's ruling in Garmon captures the essence not only of the NLRA's administrative scheme, but of this Act's enforcement procedures as well.*

H.R. Rep. No. 917, 94th Cong., 2d Sess. 4 (1976), *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 804 (1977) (emphasis added). The Conference Committee expressly adopted the House Report's position. H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 35 (1976), *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 995 (1977).

used to harass and intimidate individuals and associations from the exercise of fundamental First Amendment rights through "unjustifiable litigation burdens." H.R. Rep. No. 917, 94th Cong., 2d Sess. 4 (1976), *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 801 (1977). It also ensures that the FEC, which is constituted to be politically balanced, has primary and exclusive jurisdiction to formulate policy with regard to federal election laws.[21]

The only parties to invoke successfully jurisdiction of a three-judge court under §9011(b) have done so in suits *against the FEC* or its predecessors in order to challenge the constitutionality of provisions of the Fund Act. *See Buckley v. Valeo*, 519 F.2d 817, 819 (D.C. Cir. 1975), *aff'd in part & rev'd in part*, 424 U.S. 1 (1976); *Clark v. Valeo*, 559 F.2d 642, 646 n. 3 (D.C. Cir.) (*en banc*), *aff'd sub nom. Clark v. Kimmit*, 431 U.S. 950 (1977); *Republican National Committee v. Federal Election Commission*, 461 F. Supp. 570, 576 (S.D.N.Y. 1978) (opinion accompanying order convening three-judge court), *aff'd*, 616 F.2d 1 (2d Cir. 1980) (*en banc*), *aff'd*, 445 U.S. 955 (1980). Questions appropriately certified to a three-judge court are constitutional questions and cases of special public interest. *FEC v. AFC* at 27a; *see Republican National Committee, supra*, 461 F. Supp. at 576; *Buckley v. Valeo, supra*, 519 F.2d at 818-19. Common Cause's request to remand Count I for discovery demonstrates that Count I, like Count II, "raises complicated questions of fact and difficult questions of election law policy which are without the scope of 'implement or construe,' " *FEC v. AFC* at 26a.

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[21] *See In re* Carter-Mondale Reelection Comm., Inc., [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶9132, at 51,036-37 (D.C. Cir. Sept. 12, 1980).

Section 9011(b) does not authorize Count I. If the Court does not affirm the judgment below, it should nevertheless dismiss the appeal of Common Cause.[22]

B. Common Cause Lacks The Requisite Article III Characteristics To Press Its Claim Or Bring This Appeal.

In order for Common Cause to invoke the Court's jurisdiction under §9011(b) it must have alleged "such a personal stake in the outcome of a controversy so as to assure the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72 (1977) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)); *Buckley, supra*, 424 U.S. at 11. This "personal stake" requires " 'a distinct and palpable injury' to the plaintiff, *Warth v. Seldin*, 422 U.S. 490, 501 (1975)," *id.*, and "a fairly traceable connection between the injury alleged and the conduct at issue," *id.* Common Cause must demonstrate a "substantial likelihood that the judicial relief" it is requesting "will prevent [its] claimed injury." *Id.* at 79.[23]

The injuries claimed to be suffered by Common Cause are: (1) injury to their right as voters to have the election

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[22]See *Cort v. Ash*, 422 U.S. 66 (1975), where shortly after the creation of the FEC this Court held that 18 U.S.C. §610, now codified at 2 U.S.C. §441b, did not create a private cause of action. 422 U.S. at 76. In so holding, the Court recognized that FECA had vested the FEC with jurisdiction over private enforcement of the federal election laws. *Id.* at 74-76.

[23]The court below acknowledged that the issue of whether Common Cause possessed the requisite Article III requirements remained unresolved. FEC v. AFC at 25a.

process and federal funding scheme function in accordance with the law; (2) dilution of their votes through inducement of more votes for President Reagan; and (3) undue influence on elected officials which would impair Common Cause's effectiveness at lobbying. *See* Appendices to the Jurisdictional Statement, *Common Cause v. Schmitt*, at 82a.

The first interest is no more than a "mere interest in the problem" and is not sufficient to give Common Cause a direct stake in the outcome of this action. *See Sierra Club v. Morton*, 405 U.S. 727, 740 (1972). As to the second and third alleged injuries, it is mere speculation as to whether the Court's decision in this litigation would strengthen the votes of the individual appellants or preserve the effectiveness of Common Cause's lobbying.

Common Cause is asking the Court to redress injuries that results from acts of third parties, *i.e.*, other voters, not before the Court and events which have not and may never happen, *i.e.*, loss of lobbying influence. Speculative inferences are necessary to connect the claimed injuries to the actions of appellees. The alleged injuries do not suggest a substantial likelihood that victory would preserve Common Cause's lobbying effectiveness or preserve the strength of appellants' votes. As such, it is not "injury that fairly can be traced to the challenged action," *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1975); *see Duke Power Co., supra*, 438 U.S. at 58, or injury which is "distinct and palpable," *id.*

Common Cause lacks the requisite standing under Article III of the Constitution to press its claim under Count I.

CONCLUSION

For the foregoing reasons, appellees Americans for Change, Harrison H. Schmitt, and Carl T. Curtis move that the judgments in Nos. 80-847 & 80-1067 be affirmed, or alternatively, that the appeal in No. 80-847 be dismissed.

Respectfully submitted,

JAN W. BARAN
WILLIAM H. SCHWEITZER
REBECCA L. JACKSON
LEE LEVINE
BAKER & HOSTETLER
818 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 861-1500

Attorneys for Appellees Americans for Change, Harrison H. Schmitt and Carl T. Curtis.

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Nos. 80-847 and 80-1067

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

COMMON CAUSE, *et al.*,
Appellants,

v.

HARRISON SCHMITT, *et al.*,
Appellees.

and

FEDERAL ELECTION COMMISSION,
Appellant,

v.

AMERICANS FOR CHANGE, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

J. CURTIS HERGE
ROBERT R. SPARKS, JR.*
A. MARK CHRISTOPHER
JOHN R. CLARK, III
SEDAM & HERGE
7600 Old Springhouse Road
McLean, Virginia 22102
(703) 821-1000
Attorneys for Appellee, Fund For A Conservative Majority.
*Counsel of Record

January 26, 1981

QUESTION PRESENTED

Whether, in light of the holding in *Buckley v. Valeo*, 424 U.S. 1 (1976), section 9012(f) of the Presidential Election Campaign Fund Act may constitutionally limit the amount of money which political committees may spend as independent expenditures to further the election of a publicly-financed presidential candidate.

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AMERICANS FOR CHANGE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

Appellee, Fund For A Conservative Majority ("FCM"), pursuant to Rule 16.1 of the Rules of the Supreme Court of the United States, moves that the decision of the three-judge District Court in the cases below be affirmed

and that appellants' appeals herein be dismissed, on the ground that the questions presented in these appeals are so insubstantial as not to warrant further argument or consideration by this Court.

STATEMENT OF THE CASE

A. The Fund Act.

In 1971, Congress enacted the Presidential Election Campaign Fund Act, 26 U.S.C. §§9001-9013 ("Fund Act"), to provide for public financing of Presidential general election campaigns as an alternative to private fundraising by candidates. In order to be eligible to receive public funding, candidates must certify to the Federal Election Commission (the "Commission") that they and their authorized committees[1] will abide by restrictions on contributions and expenditures which they can incur in connection with their Presidential or Vice Presidential campaigns. 26 U.S.C. §§9002(4), 9003. Specifically, candidates of a major political party who receive public funding under the Fund Act must pledge that neither they nor their authorized committees will incur "qualified campaign expenses"[2] in excess of the

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[1] A "political committee" is defined by the Fund Act as:

> ...any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination of election of one or more individuals to Federal, State, or local elective public office. 26 U.S.C. §9002(9).

A political committee is an authorized committee of candidates for President or Vice President if it is "authorized in writing by such candidates to incur expenses to further the election of such candidates." 26 U.S.C. §9002(1).

[2] "Qualified campaign expenses" are those campaign-related expenses incurred by the candidates, their authorized committees,

[footnote continued]

amount of public funds received, and that they will not accept private contributions to defray such expenses. 26 U.S.C. §9003(b).

The provision of the Fund Act at issue in this appeal, 26 U.S.C. §9012(f), purports to regulate expenditures by political committees which are unaffiliated with, and completely independent of, authorized committees of a Presidential or Vice Presidential candidate. By its terms, 26 U.S.C. §9012(f) makes criminal the expenditure of more than $1,000 by an independent political committee to further the election of a Presidential or Vice Presidential candidate who has chosen to receive public funding of his campaign. Any officer or member of an independent political committee who violates section 9012(f) is subject to a fine of not more than $5,000, or one year imprisonment, or both. 26 U.S.C. §9012(f)(3).

Section 9012(f)(2)(A) and (B) exempt from the strictures and penalties of section 9012(f) expenditures by broadcasters or by a periodical publication in reporting the news or in taking editorial positions, and expenditures by a tax-exempt organization in communicating to its members the views of that organization.

B. FCM's Activities.

Ronald Reagan elected to receive, and did receive, public funding under the Fund Act in order to finance his 1980 Presidential general election campaign. Accordingly, Mr. Reagan and his authorized committees were barred from accepting private contributions to defray the costs of his campaign, and from spending more than the amount which he received under the Fund Act.

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or by any person authorized by the candidates or by any of their authorized committees. 26 U.S.C. §9002(11).

Appellee FCM is a multicandidate political committee,[3] incorporated as a non-stock, not for profit corporation under the laws of Virginia, and is registered with the Commission pursuant to 2 U.S.C. §433. FCM originally registered in 1972 with the General Accounting Office under the name "Young Americans Campaign Committee." On October 13, 1976, FCM amended that filing to change its name to Fund For A Conservative Majority. FCM's existence and operations antedate Ronald Reagan's unsuccessful campaign for the 1976 Republican Presidential nomination and his 1980 Presidential general election campaign.[4] During calendar year 1980, FCM expended approximately $2,000,000 in independent and direct support of various candidates for state and Federal elective office; of that amount, approximately $1,900,000 was spent by FCM as independent expenditures on its project, "Citizens for Reagan in '80," in support of Ronald Reagan.[5] FCM was not formed, has not operated in the past, and did not operate in the 1980 election cycle, solely as a booster of Ronald Reagan's candidacy for President.[6]

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[3] A "multicandidate political committee" is defined as:

> . . . a political committee which has been registered under [2 U.S.C. §433] . . . for a period of not less than 6 months, which has received contributions from more than 50 persons, and, . . . has made contributions to 5 or more candidates for Federal office. 2 U.S.C. §441a(a)(4).

[4] Co-appellee committees Americans For Change and Americans For An Effective Presidency are unincorporated associations which registered with the Commission as political committees on June 3, and July 8, 1980, respectively. Commission Jurisdictional Statement 4-5.

[5] "Citizens For Reagan in '80" was the title of a program administered by FCM, designed to describe its independent expenditures project in support of Mr. Reagan. For documentation of FCM's independent expenditures, *see* FCM's report to the Commission for the period October 16 to November 24, 1980, FEC Form 3X.

[6] Common Cause suggests in its Jurisdictional Statement that FCM used Mr. Reagan's name in the title of its project, "Citizens

[footnote continued]

C. The Proceedings Below.

On July 1, 1980, appellant Common Cause filed a Complaint in two counts against appellee Americans For Change, ("AFC"), its Chairman, and Treasurer (Civil Action No. 80-1609), seeking declaratory and injunctive relief. Count I alleged that defendants' activities on behalf of Mr. Reagan violated 26 U.S.C. §9012(f). *See Common Cause, et al. v. Schmitt, et al.*, No. 80-1609, Appendix to Common Cause Jurisdictional Statement at 77a-81a. Count II alleged that the activities of the defendants also violated other provisions of the Fund Act, and sought pretrial discovery with respect to those activities. Specifically, in Count II of its Complaint, Common Cause asserted that defendants' expenditures would be "conducted in tandem with and parallel to the official Reagan campaign." Such parallelism, it was alleged, resulted in violations on Mr. Reagan's part of his renunciation of private fundraising and excess expenditures in return for public funding of his campaign. *Id.* at 81a-82a.

On July 15, 1980, the Commission filed an action against AFC, Americans For An Effective Presidency ("AEP"), and FCM (Civil Action No. 80-1754), alleging conduct similar to that alleged by Common Cause, and seeking declaratory relief as to the constitutionality of 26

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for Reagan in '80," to "foster the impression that [it was] part of the Reagan campaign." Jurisdictional Statement 8. All of FCM's fund-raising literature made clear by express disclaimers that "Citizens for Reagan in '80" was a project of FCM; that the funds of FCM would be used to assist candidates other than Mr. Reagan; and, that its activities were not paid for or authorized by any candidate. *See, e.g.*, FCM fund-raising literature at Common Cause Exhibits to Appendix I to Jurisdictional Statement 38b-48b.

U.S.C. §9012(f) and its applicability to the activities of defendants.

Two days after the Commission filed its action, Common Cause amended its Complaint to include AEP and FCM as defendants; moved to consolidate its suit with the Commission's action; and, sought to intervene as a plaintiff in that lawsuit. The Commission opposed Common Cause's motion to intervene, and moved to dismiss the Common Cause Complaint on jurisdictional grounds.

Appellees moved for summary judgment and dismissal in both actions, and sought to stay discovery in the Common Cause case. FCM and the other defendants argued that 26 U.S.C. §9012(f) was unconstitutional in its application to their activities.

A three-judge district court was designated on July 16, 1980. The court stayed Common Cause's discovery, took briefing and argument in two stages (one on procedural matters, the other on legal issues), and, on August 28, 1980, issued orders dismissing both actions. As to the Commission's suit, the court granted defendants' motions for summary judgment on the merits. Count I of the Common Cause lawsuit was dismissed as moot in light of the court's disposition of the Commission's suit. Count II was dismissed for want of subject-matter jurisdiction, and for failure to state a claim upon which relief could be granted. On September 30, 1980, the court issued its opinion in support of its August 28, 1980 orders disposing of both actions.

From those orders Common Cause and the Commission have appealed, restating the arguments which were briefed, argued, and rejected below.

ARGUMENT

Before this Court, as they did below, appellants argue that this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), which upheld the rights of individuals and groups to expend money to express themselves on political issues, does not apply to their cases; and, that 26 U.S.C. §9012(f) may constitutionally prohibit precisely the sort of activities which this Court held were protected by the First Amendment. Alternatively, appellants contend that the holding in *Buckley* should be reconsidered in light of circumstances which they claim have changed since that decision.

Section 9012(f) was not before this Court in *Buckley*, but its effect on appellees is identical to that of a similar provision of the Federal Election Campaign Act (FECA) which this Court struck down in that case. The holding of *Buckley* applies with equal force to section 9012(f), for by its terms, that section would bar, appellants contend, invididual citizens from employing an independent political committee[7] as the vehicle for expression of their opinions on the merits of publicly-funded Presidential and Vice-Presidential candidates. *Buckley* does not permit such a limitation on the First Amendment right of political expression. This Court should say so by dismissing the appeals of Common Cause and the Commission, and by affirming the decision of the court below, citing *Buckley v. Valeo, supra.*

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[7]Common Cause has conceded that for purposes of its appeal, appellees "operated independently of the official Reagan campaign." Jurisdictional Statement 6 n.7. The Commission did not allege below and does not claim on appeal that appellees are not independent of Mr. Reagan and his authorized committees.

I.

THE COURT SHOULD NOT REVERSE THE DECISION BELOW AND REMAND THE CASE IN ORDER TO PERMIT COMMON CAUSE TO CONDUCT DISCOVERY.

Common Cause contends that, in its present posture, its case is not capable of fair constitutional adjudication, inasmuch as the court below did not permit it to conduct its requested discovery. Jurisdictional Statement 13-16.

Discovery was and is unnecessary. Appellee committees conceded below, either in their pleadings or in oral argument, that their conduct in raising and expending money to further the election of Ronald Reagan came within the proscriptive scope of 26 U.S.C. §9012(f). By conceding the applicability of section 9012(f) to their activities, appellees presented squarely to the court below the issue of the constitutionality of that section.

Common Cause now claims that its thwarted discovery would have provided a factual basis for determining whether appellees' conduct posed the dangers of *quid pro quos* which this Court recognized as potentially harmful in *Buckley*. Jurisdictional Statement 14 n.16. But this Court has already held that "the absence of prearrangement and coordination" of independent expenditures "not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley v. Valeo*, 424 U.S. at 47.[8]

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[8] That the Court was correct on this issue is demonstrated by the loudly-voiced disappointment of other independent expenditure groups, and the "New Right" in general, with Mr. Reagan's cabinet selections. Mr. Reagan's philosophy, as evidenced by his appointments to date, is apparently not a captive of those who made independent expenditures on behalf of his candidacy for President.

The district court did not decide these cases in a vacuum, as Common Cause has suggested. Jurisdictional Statement 13-16. What it did was to refuse to permit Common Cause to prosecute an enforcement action which, under statutes, is an activity reserved to the Commission. 26 U.S.C. §9010; 2 U.S.C. §437g. It had before it the concessions by appellees of their conduct, the apparent proscription of 26 U.S.C. §9012(f), and appellees' constitutional challenge to that section. The court simply followed the clear holding of *Buckley* and decided that 26 U.S.C. §9012(f) could not constitutionally prohibit appellees' independent expenditures on behalf of Ronald Reagan.

II.

THE FACT THAT SECTION 9012(f) IS PART OF A STATUTORY SCHEME FOR THE PUBLIC FINANCING OF PRESIDENTIAL ELECTIONS DOES NOT SAVE IT FROM CONSTITUTIONAL INFIRMITY.

A. Congress may not constitutionally limit independent expenditures in order to safeguard other provisions of the Fund Act.

The Commission points to the comments of various Senators made in the course of Congressional debate, which, it argues, demonstrate that section 9012(f) of the Fund Act is intended to serve as a bulwark against individuals who might form political committees to raise and spend money which they could not give to the candidate of their choice because that candidate had elected to receive public funding of his campaign. Jurisdictional Statement 12-13. If that is the purpose of section 9012(f)—and both appellants claim that it is—then 26 U.S.C. §9012(f) is unconstitutional.

If the expenditures of an individual, political committee, or other group are determined to have been made by prearrangement, or in some other prohibited way in concert with the official campaign of a publicly-financed candidate, those expenditures would violate both the Fund Act and FECA. The expenditures would be deemed to be contributions to the candidate, as well as excess qualified campaign expenses incurred by that candidate, 2 U.S.C. §441a(a)(7)(B)(i), subjecting the candidate and his authorized committees to civil and criminal sanctions. 26 U.S.C. §§9007, 9012(a); 2 U.S.C. §437g. Thus, while preventing circumvention of the contribution and expenditure limitations of the Fund Act, section 9012(f) also severely—and unconstitutionally—restricts independent advocacy, despite its substantially diminished potential for abuse. *Buckley v. Valeo,* 424 U.S. at 47.

Appellants' arguments are similar to the justification advanced by the lower court in *Buckley*, in upholding the challenge of plaintiffs, to a provision which was almost identical to section 9012(f). That court styled the section at issue there, section 608(e)(1) (18 U.S.C. §608 (e)(1), *construed in Buckley v. Valeo, supra, repealed by* Pub. L. 94-283), a " 'loophole-closing provision only' that is necessary to prevent circumvention of the contribution limitations." *Buckley v. Valeo,* 424 U.S. at 44.

Section 608(e)(1) provided that no person could make any expenditure in excess of $1,000 in a calendar year relative to a clearly identified candidate. According to this Court, "the plain effect of §608(e)(1) [was] to prohibit all individuals, who are neither candidates nor owners of institutional press facilities, *and all groups*, except political parties and campaign organizations, from voicing their views 'relative to a clearly identified candidate' through means that curtail aggregate expenditures of more than $1,000 during a calendar year."

Buckley v. Valeo, 424 U.S. at 39-40 (emphasis added). Section 608(e)(1) and 26 U.S.C. §9012(f) are of identical effect on FCM. Both would place onerous restrictions on what FCM has done in this case: to raise and spend money to advance the cause of a candidate in a Presidential general election, by means which are independent of that candidate and his official campaign. Both are defended on the ground that they are necessary to bolster and enforce other, less offensive, restrictions on constitutional freedoms.

What this Court said in *Buckley* of section 608(e)(1) applies with equal force to appellants' arguments in support of 26 U.S.C. §9012(f):

> The markedly greater burden on basic freedoms caused by §608(e)(1) thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations. Rather, the constitutionality of §608(e)(1) turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.
>
> We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify §608(e)(1)'s ceiling on independent expenditures.

Id. at 44-45.

B. Section 9012(f) limits independent expenditures by entities protected under *Buckley v. Valeo*.

Common Cause argues that sections 608(e)(1) and 9012(f) differ in that the former restricted expenditures by persons, political committees, groups, or individuals, while section 9012(f) restricts independent expendi-

tures by political committees only, not informal groups or individuals. This, Common Cause claims, makes all the constitutional difference. Jurisdictional Statement 25-26.

In holding section 608(e)(1) and other sections of FECA constitutionally deficient in *Buckley*, this Court noted that "a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, *groups*, and candidates." *Buckley v. Valeo*, 424 U.S. at 39 (emphasis added). The Court overturned what it considered to be "substantial and direct restrictions on the ability of candidates, citizens and *associations* to engage in protected political expression, restrictions that the First Amendment cannot tolerate." *Id.* at 58-59 (emphasis added). Thus, the holding in *Buckley* did not turn on the effect of section 608(e)(1) on individuals alone. Rather, the Court premised its holding on that section's effect on individuals *and groups*. The fact that the Court mentioned entities other than individuals can only mean that the First Amendment right of political expression may not be abridged on the basis of the identify of the speaker.[9]

Common Cause also urges that section 9012(f) must be upheld because it would be "unworkable and ineffective if it reached only political committees that are affiliated or coordinated with the candidate's official campaign organization." Jurisdictional Statement 18.[10] It would

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[9]Since *Buckley*, this Court has noted that free expression may not be limited on the basis of "the identity of its source, whether corporation, *association*, union, or individual." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (emphasis added).

[10]Common Cause attempts to constitutionally justify the burden of section 9012(f) by claiming that it is necessary because proving the coordination prohibited by the Fund Act is "difficult

[footnote continued]

also be unnecessary since, as pointed out above, knowing or intentional cooperation between authorized and unauthorized committees is elsewhere prohibited under the Fund Act and FECA.

Public financing of Presidential campaigns can and does work. But it cannot do so at the expense of the rights of association and political expression of those who are independent of a candidate's campaign.[11]

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and time-consuming." Jurisdictional Statement 18 n.20. Common Cause has filed with the Commission, pursuant to 2 U.S.C. §437g, an administrative complaint alleging that appellees were not in fact independent of the official Reagan campaign. The Commission is proceeding with its investigation of that complaint. That the procedure set out by Congress for such investigations may be time-consuming does not justify a severe, almost total, restriction on independent expenditures by political committees.

[11]It does not follow, as the Commission implies by its citation of *Republican National Committee v. Federal Election Commission*, 487 F.Supp. 280 (S.D.N.Y. 1980), *aff'd* 616 F.2d 1 (2d Cir. 1980) (en banc) (per curiam), *aff'd* 445 U.S. 995 (1980), that this Court's summary affirmance in that case argues for the constitutionality of section 9012(f). The provisions at issue in that case involved expenditure limitations imposed on *candidates* who accepted public funding under the Fund Act.

That is not this case. Here we deal with restrictions on *independent groups of citizens* who wish to spend money in support of the candidate of their choice, but, apparently because of section 9012(f), they are prohibited from doing so by virtue of the *candidate's* election to receive public funding. The candidate voluntarily gives up his opportunity to solicit private contributions when he accepts public funding of his campaign. That decision cannot bind his unaffiliated supporters and thereby prevent them from banding together in the exercise of their constitutional right of association.

III.

THE DISTRICT COURT DID NOT ERR IN DECLARING SECTION 9012(f) TO BE AN UNCONSTITUTIONAL ABRIDGEMENT OF FREEDOM OF SPEECH AND ASSOCIATION.

A. The donations by individuals to independent expenditure groups constitute protected speech by those individuals.

In *Buckley*, this Court drew a constitutional distinction between political contributions and expenditures. Limitations on contributions were constitutionally sanctioned; similar limitations on expenditures were not. The Court held that contribution limitations were a constitutionally appropriate means of combating the appearance or fact of improper influence stemming from the dependence of candidates on large campaign contributions. The ceilings imposed therefore served the compelling governmental interest in safeguarding the integrity of the electoral process without directly impinging on the rights of citizens to engage in political debate and discussion. *Buckley v. Valeo*, 424 U.S. at 21-35. Ceilings on independent expenditures, however, place substantial and direct restrictions on the ability of candidates, citizens and associations to engage in protected political expression, restrictions which the First Amendment cannot tolerate. *Id.* at 39-51.

The crux of appellants' argument before this Court is that appellees are *soliciting* and spending funds, with the assistance of fund-raising and media experts, to express the views of their contributors on the merits of the candidates in the 1980 presidential general election. To avoid the plain holding of *Buckley* that such expenditures are constitutionally protected, appellants make two arguments: first, they contend that what is actually at

issue in this appeal are *contributions* by individuals to the independent committees, rather than *expenditures* by those committees; alternatively, appellants argue that these independent expenditures are of a great magnitude than envisioned by this Court in *Buckley* and, therefore, ought not to be permitted.

Common Cause contends that Section 9012(f) is constitutional because it does not restrict any person's right "to associate himself with any candidate, political party, group, or other entity. All it regulates is the use by political committees of money contributed in response to mass solicitation appeals." Jurisdictional Statement 26. That is not what that section regulates. Section 9012(f) does not address how the funds which it purports to regulate have been raised. Appellants argue that it is a flat proscription of all independent expenditures above a certain level by political committees. If so, it does what section 608(e)(1) did in *Buckley*. It "precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association." *Buckley v. Valeo*, 424 U.S. at 22. All FCM has done is to effectively amplify the voice of its adherents.

According to Common Cause, groups of individuals are free to pool their own money and to spend it themselves without limit. Jurisdictional Statement 24. But they may not, in appellant's view, do so through third parties who collect and spend that money, least of all through third-parties with some expertise in the art of fund-raising and political expression.[12] Whether there is an air of

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[12]Common Cause complains that a "band of political pros" and "a few political operators" are involved in the independent

[footnote continued]

expertise to independent expenditures should not be constitutionally significant, for whether speech can be constitutionally restricted does not turn on the identity of the speaker. *First National Bank of Boston v. Bellotti, supra.* The focus should be on whether the *speech* is protected. This Court said in *Buckley* that it is.

The Presidential campaigns of the major party candidates in the 1980 general and primary campaigns were funded from the public fisc with large sums of money. Those candidates had at their disposal the most sophisticated means of communication and political advice to assist them in presenting their views to the American public. Appellants' model of a group of citizens who have banded together to contribute their own funds and time to express their political views is unrealistic in light of modern day realities, including the cost of effective communication. This Court has noted that "virtually every means of communicating ideas in today's mass society requires the expenditure of money.... The electorate's increasing dependence on television, radio and other mass media for news and information has made

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expenditures of appellees and others. Jurisdictional Statement 28. It is simply unrealistic to assume that independent political committees which raise and expend money to express the views of their contributors will not seek the assistance of those with expertise and experience in such matters. All publicly-supported organizations, even Common Cause, seek the help of seasoned professionals in their fund-raising efforts.

Quaere: In view of Common Cause's concern about the effect of such experts on the political process and its solicitude for "groups of individuals free to pool their own money," would Common Cause object if a group of such professionals pooled their own money to express their political views? Could any one of them collect that money and decide precisely how it is to be spent, or would that make the group a "political committee?"

these expensive modes of communication indispensable instruments of effective political communication." *Buckley v. Valeo*, 424 U.S. at 19. Appellants' ideal would consign such groups to political impotency because they could not afford to express themselves in any way which would be likely to have an impact on public debate.

As the lower court has observed, a contributor's First Amendment rights are not coextensive with his actual participation in preparing or placing an advertisement. There is no constitutional reason why like-minded individuals cannot form a "political committee" for the purpose of making independent expenditures of a candidate. Likewise, there is no reason why individuals should not be able to contribute to an already-existing committee, and it should make no constitutional difference that such contributions are made in response to a fund-raising appeal prepared by a professional fund-raiser. Nor should it matter whether the contributor's speech is given voice by the contributor himself or whether it has a professional touch to make it more effective. The issue is whether such speech is constitutionally protected.

Appellants have chosen to focus their constitutional analysis on the mechanics of the expenditure (the donation of money to a committee), which they claim make it a contribution, rather than on its effect, which is to permit citizens of average means to make their political viewpoint heard in a loud and crowded political arena. In citing the language of *Buckley* which upheld limitations on contributions, appellants have ignored this Court's explanation of that holding:

> Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if

> the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy. *There is no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations.* The overall effect of the Act's contribution ceiling is merely to require candidates and political committees to raise funds from a greater number of persons and *to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.*

Buckley v. Valeo, 424 U.S. at 21-22 (emphasis added).

In appellants' view, expenditures by professionally-run independent expenditure committees are permitted, subject to the strictures of section 9012(f), but contributions to those committees are not, because the money contributed is transformed "into political debate . . . by someone other than the contributor." Common Cause Jurisdictional Statement 22, citing *Buckley* at 21. If appellants are correct, there will indeed be a "dramatic adverse effect on the funding of campaigns and political associations," *Buckley v. Valeo*, 424 U.S. at 21, and the "total amount of money potentially available to promote political expression" will be reduced. *Id.* at 23. In short, precisely those consequences which this Court believed would not follow, and which justified its decision in *Buckley* upholding contribution limitations, will come about if appellants' view is adopted by this Court.

What appellants want is *Buckley* and more: no individual contributions and no significant independent expenditures, certainly not by political committees fi-

nanced by the donations of those who would otherwise not be heard.

Even the small, self-governing groups idealized by Common Cause, and the "informal groups" envisioned by the Commission, would run afoul of section 9012(f). Although the Commission claims that it has never decided that an informal group, in which individuals retain control over their funds, would be considered a "political committee,"[13] groups very much like those extolled by appellants have been so held.

In Advisory Opinion 1976-51 (issued September 2, 1976), Fed.Elec.Camp.Fin.Guide (CCH), ¶5215, the Commission ruled that an informal discussion group that discussed general foreign policy was considered a "political committee." In its request for a written opinion from the Commission, the group indicated that its general expenses might exceed $1,000 in a calendar year, and that there was a possibility that contributions in the form of checks from individual members of the informal discussion group to a particular candidate might be collected by one person of the group and delivered to a candidate who may have been "the subject of discussion" among the individuals of the group. Thus, according to the Commission, this once "informal" discussion group, which made an "an hoc" collection of contributions, became a political committee, was required to register with the Commission, open a bank account, elect a treasurer and chairman, file disclosure reports with the Commission, and was otherwise subject to the myriad civil and criminal penalties of FECA.

In Advisory Opinion 1979-41 (issued September 13, 1979), *Id.* at ¶5247, the Commission ruled that a group

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[13]Commission Jurisdictional Statement 19.

which purchased an advertisement in the *New York Times* was a political committee if the cost of the advertisement exceeded $1,000 and the "basic thrust" of the advertisement was to seek an *unidentified* alternative candidate to President Carter. The Commission concluded that "a group soliciting funds and making expenditures which are expected to be in excess of $1,000" would be considered a "political committee."

Thus, it is possible—indeed, likely—that the expenditures of groups such as those suggested by appellants would in fact be found to come within the expenditure limitations of section 9012(f). Application of that section to such groups would effectively eliminate them as voices in the political process, since a group of individuals, required to prepare and distribute their own political literature and bound by a $1,000 limitation on its expenditures, would be ineffective, cumbersome, and probably more trouble than it was worth to its members. Of course, individuals would remain free to make unlimited independent expenditures to the extent that they could afford to do so. But not many individuals could afford to spend enough money to give effective voice to their views.

B. The political speech of individuals may not be abridged because of the growth of independent expenditure groups through which they speak.

Appellants argue that there has been a change in the landscape of Presidential election campaigns since 1976, when *Buckley* was decided. They complain that the growth of independent expenditures has been greater than expected and that, consequently, the managers and financial decision-makers of committees like FCM pose a danger of the sort sought to be eliminated by public funding of Presidential campaigns.

Independent expenditure committees like FCM cannot exist without the donations of their contributors. Such committees provide the only means by which like-minded citizens can unite in an effective way to make themselves heard. It is the chorus of voices of the contributors to an independent expenditure group which makes it effective. Although the power of the purse of such a group is important, it is ephemeral, for it exists only so long as contributors continue to give their money to that group; and, they will give only so long as that group is perceived by them to be representing their point of view. It is this authority on the part of the decision-makers of independent expenditure groups which appellants decry.[14]

The Fund Act is not aimed at extirpating the influence of those who control the donations of many small contributors. That statute is aimed at preventing outright contributions directly to a candidate, or expenditures on his behalf made in concert or cooperation with the candidate, by individuals or groups of contributors. It is these contributors who, unlike the chairman of a donor-supported independent expenditure group, can condition their expenditures on the receipt of special influence or some other improper *quid pro quo*. Just as a single wealthy individual, or an "informal group" of wealthy individuals (if they escape the Commission's expansive view of a "political committee"), can make independent expenditures on a large scale, so

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[14]If groups like FCM have been successful in raising funds, it is because the American public have been willing to contribute their money in order to make themselves heard. As a further safeguard against any one contributor exerting undue influence on an independent expenditure group, 2 U.S.C. §441a(a)(1)(C) provides that an individual may give no more than $5,000 per calendar year to a political committee.

also should groups of less prosperous citizens be able to pool their resources to make independent expenditures.

So long as FCM and other groups like it are independent of the candidate or his official campaign, under *Buckley* and the First Amendment they cannot be restricted in their expenditures, for their expenditures represent the protected speech of their contributors. This Court should so hold.[15]

CONCLUSION

Accordingly, the Court should summarily affirm the decision of the district court below and dismiss the appeals of Common Cause and the Commission, citing *Buckley v. Valeo, supra.*

Respectfully submitted,

J. CURTIS HERGE
ROBERT R. SPARKS, JR.*
A. MARK CHRISTOPHER
JOHN R. CLARK, III
SEDAM & HERGE
7600 Old Springhouse Road
McLean, Virginia 22102
(703) 821-1000
Attorneys for Appellee, Fund For A Conservative Majority.
*Counsel of Record.

January 26, 1981

[15]In addition to the constitutional deficiencies discussed above, we also note that section 9012(f) contains two exemptions from its provisions, which raise constitutional questions relating to the underinclusiveness of that provision. *Cf. First National Bank of Boston v. Bellotti, supra,* at 793.

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Nos. 80-847 and 80-1067

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMON CAUSE, *et al.*,
Appellants,

v.

HARRISON SCHMITT, *et al.*,
Appellees.

FEDERAL ELECTION COMMISSION,
Appellant,

v.

AMERICANS FOR CHANGE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

Of Counsel:

KENNETH J. GUIDO, JR.
ELLEN G. BLOCK
DONALD J. SIMON
COMMON CAUSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1200

MICHAEL L. BURACK
Counsel of Record
ROGER M. WITTEN
CLIFFORD B. HENDLER
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Attorneys for Appellants Common Cause, David Cohen and Winifred Long

February 6, 1981

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-847

COMMON CAUSE, *et al.*,
Appellants,

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HARRISON SCHMITT, *et al.*,
Appellees.

No. 80-1067

FEDERAL ELECTION COMMISSION,
Appellant,

v.

AMERICANS FOR CHANGE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM [1]

According to appellees, it is perfectly appropriate—indeed, desirable—for this Court to invalidate an Act of Congress without a factual record to illuminate either the actual working of the statute or the important gov-

[1] Common Cause, David Cohen and Winifred Long, appellants in No. 80-847, are filing this Opposition in both of the above-captioned cases because both cases involve the same constitutional issue, arise out of the same proceeding, and have been briefed together by appellees.

Citations to our Jurisdictional Statement are given by "J.S. ——." Citations to the Appendices to our Jurisdictional State-

ernmental interests it serves, and without full briefing and argument to explore the constitutional issues at stake. Appellees are wrong.

The invalidation of 26 U.S.C. § 9012(f) would have serious consequences, for—as the Federal Election Commission ("the Commission") has emphasized—it would substantially undermine the public-financing scheme enacted by Congress in the Fund Act.[2] *See* FEC J.S. 13-15; *see also* J.S. 16-19. These cases therefore require careful, fully informed consideration. Consistently with its long-standing practice, the Court should reverse (or vacate) the decision below and remand the cases to the district court so that an adequate record can be developed. In any event, the Court should not decide the constitutional issues in the absence of full briefing and argument. As for AFC's jurisdictional and standing arguments—on which the court below did not rule—the Court should either reject them now or let the district court consider them first on remand.

I. APPELLEES HAVE GIVEN NO COGENT REASON WHY THIS COURT SHOULD DEPART FROM ITS LONG-STANDING PRACTICE OF REQUIRING THE DEVELOPMENT OF AN ADEQUATE FACTUAL RECORD AS A PREDICATE FOR CONSTITUTIONAL ADJUDICATION.

A fully developed factual record is a basic prerequisite for the delicate task of constitutional adjudication. This Court has consistently reversed district court decisions and remanded for factual development when the record did not provide "the concrete factual setting . . .

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ment are given by "App. ——." Finally, citations to the Jurisdictional Statement filed by the Federal Election Commission are given by "FEC J.S. ——."

[2] Presidential Election Campaign Fund Act, 26 U.S.C. ch. 95.

especially demanded for constitutional decision." *United States* v. *Automobile Workers*, 352 U.S. 567, 591 (1957).[3]

Appellees do not deny the importance of this principle; they do not deny that the record in this case is extraordinarily sparse; and they do not claim that the relatively limited discovery needed to compile a factual record would in any way prove burdensome. Instead, appellees contend that a factual record is simply unnecessary in this case: They pretend that this Court would need a factual record only in order to determine whether they are covered by Section 9012(f), concede that the statute applies to them, and then insist that the Court has all the information it needs to strike down the statute.

Appellees' argument is fundamentally flawed. The issue before this Court is not whether Section 9012(f) applies to them—it clearly does—but whether, in light of all of the circumstances surrounding its application to committees such as appellees, Section 9012(f) is constitutional. When the constitutionality of an Act of Congress is challenged, the context in which the statute operates, the effects it has and the interests it serves must be explored and fully understood—even if it is undisputed that the challengers come within the statute. *See* note 3 *supra*. These matters must be explored in this case; they are factual in nature, and they cannot (and should not) be decided on the basis of blind hunches or argumentative assertions.

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[3] In addition to the cases cited at J.S. 13, 15 & n.18, *see, e.g.*, *Mandel* v. *Bradley*, 432 U.S. 173, 177-79 (1977) (*per curiam*) (decision vacated and remanded where a three-judge district court had held a statute unconstitutional on the basis of a previous Supreme Court decision instead of "sift[ing] through the conflicting evidence and making findings of fact" concerning the operation of the statute); *Storer* v. *Brown*, 415 U.S. 724, 738-40 (1974) (this Court stated it was "quite sure" that the decision of a three-judge district court should be vacated and remanded because in order "to assess realistically whether the law imposes excessively [and thus unconstitutionally] burdensome requirements . . . it is necessary to know other critical facts which do not appear from the evidentiary record"); *Gilmore* v. *City of Mont-*

There is another, equally fundamental reason why appellees are wrong in requesting this Court to decide the case on a virtually non-existent record. The district court's decision—which appellees say was correct and urge this Court to affirm—depended upon crucial factual findings that the record does not support, that appellants (including the Commission) contend are erroneous, and that even appellees have not seriously attempted to defend.

The district court correctly stated that "[a] 'contribution' case . . . is entitled to less-exacting judicial scrutiny [than an 'expenditure' case] because the 'transformation of contributions into political debate involves speech by someone other than the contributor.'" App. 15a (*quoting Buckley* v. *Valeo*, 424 U.S. 1, 21 (1976)) (footnote omitted). The court found, however, that no such "transformation" occurs in the case of committees such as appellees, because (in the court's view) the contributors control the committees' expenditures. On that basis—and that basis alone—the district court held that Section 9012(f) operates as an "expenditure" limitation and struck it down. App. 15a-18a. Thus, the district court's decision hinged on its finding that the contributors control how the committees spend their contributions.

To the extent the record sheds light on the relationship between committees and their contributors, it indicates—as we have already noted, and as the Commission agrees—that the district court's finding was incorrect. *See* J.S. 7 n.9; FEC J.S. 24-25. But the point here is not whether the district court's finding was or was not correct on the basis of the record before it. The point is, rather, that the record is woefully inadequate to enable any court (including this Court) to decide with any degree of

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gomery, 417 U.S. 556, 570-74 (1974) (decision reversed in part and remanded where the record before this Court did "not contain sufficient facts upon which to predicate [the requisite] legal judgments").

assurance a central issue in this case—whether the contributors in fact exercise control.[4]

Appellees do not contend that the record is adequate to serve as the basis for deciding this issue. AFC and FCM are simply mute on the subject, while AEP makes the extraordinary suggestion that the district court's findings are gratuitous and should simply be ignored. *See* AEP Br. 9-10 n.9. But findings as to control were essential to the district court's analysis, and such findings require a factual record. *Cf. Beal* v. *Doe*, 432 U.S. 438, 448 (1977) (case remanded to three judge court where the record was inadequate to permit this Court to determine who really controlled the medical decision at issue).

This Court should decline appellees' invitation to decide a delicate and important constitutional issue in the dark. A fully developed record is essential here just as it was in the previous cases in which this Court has ruled on the constitutionality of election-law provisions.[5] The Court

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[4] It is equally impossible to decide, on the present record, whether another finding crucial to the district court's constitutional analysis is in fact correct—its finding that a political committee's formal independence eliminates any danger that the candidate, if elected, will be (or appear to be) beholden to the committee. App. 19a; *see* J.S. 11, 27. This conclusion is essentially factual in nature. Evidence can and should be developed bearing on the question whether the activities of entities like appellees pose the kinds of dangers of actual or apparent *quid pro quo's* that this Court recognized in *Buckley*. *See* 424 U.S. at 26-27.

Appellee FCM has erroneously suggested that this question was answered in *Buckley*. *See* FCM Br. 8. But FCM has ignored this Court's express statement that its discussion of independent expenditures in *Buckley* was limited to election practices as they "presently appear[ed]." 424 U.S. at 46. The kinds of entities and activities at issue in this case were unknown and unforeseen when *Buckley* was decided, and they were not before this Court for consideration in *Buckley*. *See* J.S. 20-21.

[5] *Buckley* v. *Valeo*, *supra*, 424 U.S. at 9-10; *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280,

should, therefore, reverse (or vacate) the decision below and remand these cases for the development of an adequate factual record.

II. THERE IS NO MERIT TO APPELLEES' CONTENTION THAT THESE CASES DO NOT WARRANT PLENARY REVIEW.

Appellees' contention that the district court's invalidation of 26 U.S.C. § 9012(f) does not present a substantial federal question is—and we use this term advisedly—frivolous. As the Commission has correctly stated, Section 9012(f) was "rooted in Congress' wise, indeed expert, assessment of the potential danger in allowing political professionals to amass, control and spend vast sums to secure the election of presidential candidates." FEC J.S. 13. *Accord*, J.S. 16-19. In concluding that Section 9012(f) does not serve important governmental interests, the district court simply disagreed with Congress' considered determination. Under these circumstances, summary disposition of these cases would be inconsistent with the respect owed to considered determinations of the Legislative Branch in matters so peculiarly within its expertise.

Nothing in *Buckley* v. *Valeo* diminishes the need for plenary consideration in these cases. Neither Section 9012(f) nor the kinds of activities in which appellees have engaged were before this Court in *Buckley*, *see* J.S. 20-21, and appellees do not contend otherwise. Moreover, the across-the-board prohibitions against independent expenditures that the Court overturned in *Buckley* differed in every material respect from the carefully tailored limitation contained in Section 9012(f). *See*

290-307 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980).

There is no merit to AEP's suggestion that this Court ignored the record in *Buckley*. *See* AEP Br. 10 n.9. This Court relied extensively upon that record. *See, e.g.* 424 U.S. at 20 nn.20-21, 21-22 n.23, 26 n.27, 32 nn.34-37, 33 n.39, 34 n.40, 37 n.42.

J.S. 24-26.[6] Thus, in arguing that *Buckley* mandates affirmance of the decision below, appellees are in reality asking this Court significantly to extend *Buckley*. *See* J.S. 25 & n.26. Such a step would require plenary consideration.[7]

Full briefing and argument will materially assist the Court in resolving important questions of statutory construction that bear directly on the constitutionality of Section 9012(f). Section 9012(f) only applies to "political committees" as that term is defined in the Fund Act. Appellants contend that the term, properly construed, excludes groups of individuals who pool and spend their own money, without relinquishing control over it, and that such groups therefore do not come within Section 9012(f). *See* J.S. 24 & n.23. *See also* FEC J.S. 19. In response, AEP asserts that this construction is "not based on statutory language, legislative history, . . . or on any other criterion utilized by lawyers." AEP Br. 20. But

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[6] In particular: (1) As appellees concede, Section 9012(f) leaves individuals free to make unlimited independent expenditures, whereas the statute overturned in *Buckley* prohibited essentially all such expenditures. (2) Section 9012(f) only applies to a narrow and specific type of group ("political committees" within the meaning of the Fund Act), whereas the statute overturned in *Buckley* applied to all groups. (3) Section 9012(f) does not (and was not intended to) place a limit on the total amount of money that can be spent to support candidates, whereas the statute overturned in *Buckley* drastically restricted the overall quantity of political speech. (4) Section 9012(f) protects the integrity of the Fund Act's public-financing scheme and therefore applies only when a candidate has accepted public funding, whereas the statute overturned in *Buckley* choked off all independent expenditures regardless of whether a candidate had received public financing.

[7] Appellees also err in contending that *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), supports affirmance. To be sure, *Bellotti* explained that the capacity of speech for informing the public does not depend upon the identity of its source. *Id.* at 777. But that capacity is not at issue here. Rather, these cases call into question Congress' power to protect against actual (or apparent) *quid pro quo*'s resulting from the creation

as AEP must be aware,[8] appellants' construction finds support in both the language of the Fund Act[9] and its legislative history.[10] It is also supported by the well-established principle—which runs directly counter to appellees' approach—that this Court's "task is not to destroy the Act if we can, but to construe it, if consistent with the

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of political debts in candidate elections. *Bellotti* did not deny Congress that power; to the contrary, it acknowledged it. *Id.* at 788 n.26.

[8] Appellants provided detailed support for their position on this point in their district court briefs filed on August 4 and 18, 1980.

[9] The statutory language shows that only a relatively narrow class of entities are "political committees" within the meaning of the Fund Act. The Fund Act defines a "political committee" to include only a "committee, association, or organization (whether or not incorporated). . . ." 26 U.S.C. § 9002(9). By contrast, the Federal Election Campaign Act ("FECA") defines a "political committee" as including "any committee, *club*, association, *or other group of persons*. . . ." 2 U.S.C. § 431(4)(A) (emphasis added). Similarly, the Presidential Primary Matching Payment Account Act defines a "political committee" as including "any *individual*, committee, association, or organization (whether or not incorporated). . . ." 26 U.S.C. § 9032(8) (emphasis added). The Fund Act thus defines "political committee" more narrowly than do these other statutes. The differences are significant, and "[t]he inference seems reasonable . . . that Congress by the words it chose marked a distinction which we should not obliterate. . . ." *Board of Governors* v. *Agnew*, 329 U.S. 441, 448 (1947).

These differences in statutory definitions undercut FCM's reliance on two Commission advisory opinions. *See* FCM Br. 19-20. Since both involved the FECA, rather than the Fund Act, they applied a broader definition of "political committee." Those opinions are therefore immaterial to a determination of what constitutes a "political committee" within the meaning of the Fund Act.

[10] *See, e.g.*, the remarks of Senator Pastore, the sponsor of the Fund Act, at 117 Cong. Rec. 42397-98 (1971) (speaking against amendment that, if adopted, would have extended Section 9012(f) to all types of committees). *See also id.* at 42626 (Fund Act would permit a group of people to pool their money, hire a hall and hold a rally).

will of Congress, so as to comport with constitutional limitations." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974), *quoting Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 571 (1973). This task can be successfully performed here. Indeed, Section 9012(f), properly construed, comports exactly with the constitutional distinction between contributions and expenditures that this Court drew in *Buckley*. *See* J.S. 24-25.

Appellees are therefore wrong in alleging that appellants seek to relitigate *Buckley*. We seek, rather, to construe Section 9012(f) "so as to comport with the constitutional limitations" announced in *Buckley*. To be sure, that task may involve difficult questions of constitutional and statutory analysis. But that is precisely why these cases should be decided only after plenary briefing and argument.

III. THIS COURT SHOULD REJECT THE ERRONEOUS JURISDICTIONAL AND STANDING ARGUMENTS ADVANCED BY AFC, OR IN THE ALTERNATIVE SHOULD ALLOW THE DISTRICT COURT TO PASS UPON THEM IN THE FIRST INSTANCE ON REMAND.

AEP and FCM apparently agree that appellants' appeal (No. 80-847) is within the jurisdiction conferred by the judicial review provision of the Fund Act, 26 U.S.C. § 9011(b), and is properly before this Court.[11] AFC, however, has moved this Court to dismiss the appeal on jurisdictional and standing grounds. AFC Br. 11-17. The Court should deny AFC's motion.

A. This Court Should Reject AFC's Jurisdictional Argument.

There is no merit to AFC's argument that 26 U.S.C. § 9011(b) does not authorize Count I of appellants' action—the only part of that action involved in this appeal.

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[11] Neither AEP nor FCM contends that appellants' may not properly prosecute this appeal. Nor has the Commission moved to dismiss the appeal.

See J.S. 10 n.15. Count I alleges that Section 9012(f) of the Fund Act applies to appellees' activities and requests appropriate declaratory and injunctive relief. Thus, Count I is authorized by the plain language of 26 U.S.C. § 9011(b), which states that "individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or construe any provisions of" the Fund Act.[12] Congress has never expressly repealed this provision, and AFC does not contend otherwise.

AFC's argument is, at bottom, that Congress worked an implied repeal of Section 9011(b)'s express authorization to institute actions to "implement or construe" the Fund Act when, in 1976, Congress amended the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431 *et seq.*, to give the Commission exclusive "enforcement" jurisdiction. *See* 2 U.S.C. § 437c(b)(1). But it is a "cardinal rule" of statutory construction that such implied repeals are disfavored. *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974), *quoting Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936). An implied repeal may be found only when there is an "affirmative showing of an intention to repeal" or when "the earlier and later statutes are irreconcilable"—that is, when they are not "capable of co-existence." *Morton* v. *Mancari*, 417 U.S. at 550, 551. AFC's argument fails under this test, because (1) there is no "affirmative showing of an intention" to repeal Section 9011(b) either in whole or in

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[12] It is undisputed that appellants David Cohen and Winifred Long are "individuals eligible to vote for President" within the meaning of 26 U.S.C. § 9011(b). App. 73a-74a. It is also undisputed that appellant Common Cause has members who are "eligible to vote for President" and whose interests it represents in election-law matters, including litigation. App. 72a-73a. *Cf. Buckley* v. *Valeo*, 424 U.S. at 9 n.5.

part,[13] and (2) the private right of action expressly authorized by Section 9011(b) of the Fund Act is entirely "capable of co-existence" with Section 437c(b)(1) of the FECA.[14]

AFC's argument rests, moreover, on an erroneous premise. According to AFC, Count I of appellants' action is an "enforcement" matter within the meaning of Section 437c(b)(1) of the FECA, rather than an action to "implement or construe" the Fund Act within the meaning of Section 9011(b) of that Act. *See* AFC Br. 12. But

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[13] The legislative history relating to 2 U.S.C. § 437c(b)(1) contains no evidence whatsoever—let alone an "affirmative showing"—of any intention by Congress to repeal the authorization expressly granted by Section 9011(b). Indeed, the legislative history does not even mention Section 9011(b). This fact is dispositive on the question of an "intention to repeal," because the 1976 legislation did, expressly and specifically, amend other Fund Act provisions. *See* Pub. L. No. 94-283, Tit. III, 90 Stat. 497-502. With Congress explicitly specifying how it wished to change those provisions, it makes no sense to assume that Congress would have decided to repeal all or part of Section 9011(b) *sub silentio*.

[14] Section 9011(b) is entirely compatible with the provision of the FECA that deals with the exclusivity of remedies. 2 U.S.C. § 437d(e). That provision, which AFC has chosen to ignore, makes actions by the Commission "the exclusive civil remedy for the enforcement of the provisions of this Act"—*i.e.*, of the FECA. *See* 2 U.S.C. § 431(19). Because Section 9011(b) provides a remedy for resolving issues that arise under the Fund Act only, and not under the FECA, it is clearly "capable of co-existence" with Section 437d(e).

Section 437c(b)(1), in turn, is "capable of co-existence" with both Section 9011(b) and Section 437d(e). Section 437c(b)(1) does not deal with the exclusivity of any remedy; it deals, rather, with the scope of the Commission's enforcement jurisdiction. The purpose of Section 437c(b)(1) was to "simplify and rationalize" the civil enforcement powers that had previously been divided between the Commission and the Department of Justice. H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 3 (1976). Thus, Section 437c(b)(1) and Section 9011(b) are fully reconcilable.

Count I of appellants' action is virtually identical to the Commission's action. *See* J.S. 8-9. The Commission, however, does not regard its action as an "enforcement" matter; for instead of proceeding administratively, *see* 2 U.S.C. § 437g(a)(2),[15] the Commission brought an action under Section 9011(b) to "implement or construe" the Fund Act. *See* FEC J.S. 1. Since the Commission's action is an action to "implement or construe" authorized by Section 9011(b)—and no party contends otherwise—appellants' Count I, which involves the identical claim, is also an action to "implement or construe" authorized by that Section.

Equally unmeritorious is AFC's suggestion that the only actions which voters may bring under 26 U.S.C. § 9011(b) are actions against the Commission to challenge the constitutionality of provisions of the Fund Act. *See* AFC Br. 15. To limit actions under Section 9011(b) to suits seeking to overturn Fund Act provisions as unconstitutional would read the word "implement" out of the statute. Indeed, such a limitation would be contrary to the obvious intent of Congress, for it would allow only suits whose purpose was to *prevent* the implementation of the statute as enacted. Such a limitation would also be inconsistent with the Commission's prosecution of its own action under Section 9011(b)—an action, to which AFC has raised no jurisdictional objection, that seeks to give effect to, rather than to overturn, Section 9012(f) of the Fund Act.

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[15] As AFC acknowledges, "enforcement" matters are governed by 2 U.S.C. § 437g, which prescribes administrative procedures to be used in such cases. *See* AFC Br. at 12 n.17. Those procedures apply not only to "enforcement" matters initiated by private parties, 2 U.S.C. § 437g(a)(1), but also to "enforcement" matters initiated by the Commission, *id.* § 437g(a)(2).

B. This Court Should Reject AFC's Standing Argument.

AFC's argument that appellants lack standing also fails to withstand scrutiny. That argument ignores the crucial fact that Congress, in enacting 26 U.S.C. § 9011(b), determined that "individuals eligible to vote for President" have a sufficient stake in the statutory scheme for the public financing of Presidential elections to justify authorizing such persons to institute actions designed to ensure the proper functioning of that scheme.[16]

The cases that AFC cites do not advance its standing argument. *See* AFC Br. 16-17. Those cases, without exception, involved questions of standing that arose in the absence of an express statutory grant of authorization such as that contained in Section 9011(b). Here, Congress has created a statutory scheme, has determined that certain groups of persons have interests that are affected by it, and has expressly authorized those persons to institute actions to protect their interests. In such situations, Congress' determination is decisive on the question of standing.[17] As this Court stated in *Sierra Club* v. *Morton*, 405 U.S. 727, 732 n.3 (1972), "where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue' . . . is one within the power of Congress to determine" (citation omitted).

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[16] Congress' determination was eminently reasonable; it is, after all, the voters whose interests the Fund Act is ultimately designed to safeguard.

[17] *See, e.g., Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 212 (1972) (concurring opinion of Justices White, Blackmun and Powell); *Animal Welfare Institute* v. *Kreps*, 561 F.2d 1002, 1005-06 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 511 F.2d 809, 814 n.26 (D.C. Cir. 1975).

C. In the Alternative, This Court Should Withhold Its Decision on the Jurisdictional and Standing Issues Until After the District Court Has First Passed Upon Them on Remand.

The district court has not yet passed upon the jurisdictional and standing issues raised by AFC.[18] Accordingly, if this Court does not now deny AFC's motion to dismiss, it should withhold decision on the jurisdictional and standing issues until after the district court, on remand, has ruled on them in the first instance.[19] This course is particularly appropriate, since these cases should in any event be remanded to the district court for factual development. *See* J.S. 13-16 and pp. 1-6 *supra*. This procedure would promote judicial economy, and would also ensure that these issues, when they finally come before this Court, will be framed in the manner best suited for disposition by it.

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[18] The district court considered jurisdiction only with regard to Count II of appellants' action, and—as AFC correctly acknowledges—only Count I is before this Court. AFC Br. 4 n.6. AFC thus also concedes, as it must, that the district court did not resolve either the issue whether 26 U.S.C. § 9011(b) authorizes appellants to prosecute the claim stated in Count I, *see* AFC Br. 11 n.15, or the issue whether appellants have standing to prosecute that claim, *see id.* at 16 n.23.

[19] *See, e.g., Youakim* v. *Miller*, 425 U.S. 231, 236 (1976) ("claim should be aired first in the [three-judge] District Court"); *United States* v. *Mississippi Tax Commission*, 412 U.S. 363, 379, 381 (1973) (same).

CONCLUSION

For the reasons set forth in appellants' Jurisdictional Statement and in this Opposition, the Court should deny appellees' motions to dismiss or affirm and should reverse (or vacate) the decision below and remand these cases to the district court. In the alternative, the Court should note probable jurisdiction of these appeals and set them down for a full hearing.

Respectfully submitted,

MICHAEL L. BURACK
Counsel of Record
ROGER M. WITTEN
CLIFFORD B. HENDLER

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Attorneys for Appellants Common Cause, David Cohen and Winifred Long

Of Counsel:

KENNETH J. GUIDO, JR.
ELLEN G. BLOCK
DONALD J. SIMON
COMMON CAUSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1200

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No. 80-847 and No. 80-1067

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-847

COMMON CAUSE, ET AL.,
Appellants,

v.

HARRISON SCHMITT, ET AL.,
Appellees.

and

No. 80-1067

FEDERAL ELECTION COMMISSION,
Appellants,

v.

AMERICANS FOR CHANGE, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC., AMICUS CURIAE

BEN B. BLACKBURN
WAYNE T. ELLIOTT*
ALLEN R. HIRONS
Attorneys for Southeastern Legal Foundation, Inc.
1800 Century Boulevard,
Suite 950, Atlanta, Georgia 30345
(404) 325-2255

*Counsel of Record

January 26, 1981

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BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC., AMICUS CURIAE

INTEREST OF AMICUS CURIAE

Southeastern Legal Foundation is a non-profit corporation organized in 1976 for the purpose of advancing the consideration of public interest viewpoints in adversarial proceedings involving significant issues. In particular, Southeastern has been active in many forums urging greater respect for individual rights and liberties. This Court has permitted Southeastern

to file amicus curiae briefs in several cases during its past three terms and Southeastern has submitted such briefs to a number of United States Courts of Appeals and District Courts.

Southeastern participated as amicus curiae in the instant cases before the District Court and now wishes to continue that participation before this Court.[1] The parties in both cases have consented to the filing of this brief. Copies of their consent letters have been filed with the Clerk of the Court.

A large number of individuals contributed to the activities of various independent political committees during the 1980 presidential election. Among these individuals are some of Southeastern's trustees, officers and contributors. They have a direct interest in the status of Section 9012(f) of the Presidential Election Campaign Fund Act ("Fund Act"),[2] and have a continuing interest in the preservation of their First Amendment right to engage in political activities through the mechanism of independent committees.

The scope of political activities protected by the First Amendment can be sharpened and defined by a consideration of the constitutionality of Section 9012(f). The rights of all individuals interested in supporting and utilizing independent political committees, outside the control of candidate-authorized or official party committees, are at stake and would be adversely affected by a reversal of the decision below. For these

[1] Due to the common issues of the two cases before the Court, Southeastern addresses both cases with one brief.

[2] 26 U.S.C. § 9012(f).

reasons, Southeastern submits this brief to urge this Court to note probable jurisdiction and to affirm.

SUMMARY OF ARGUMENT

Section 9012(f) of the Fund Act limits political activities which are independent of control and coordination by presidential candidates or political parties. That limitation unconstitutionally burdens the First Amendment right of individuals to exercise freedom of speech and freedom of association.

No compelling governmental interest can justify the broad sweep of Section 9012(f)'s encroachment upon those rights. Consistent with this Court's past decisions, this Court can and should affirm the opinion below striking down Section 9012(f).

Common Cause,[3] while ostensibly seeking an ultimate adjudication as to the constitutionality of Section 9012(f), asks this Court to reverse and to remand to the District Court for further factual discovery. The issue of constitutionality, however, can and should be decided without the unnecessary delay of a remand.

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[3] This brief refers to the appellants in Common Cause v. Harrison Schmitt, Case No. 80-847, as "Common Cause," and to the Federal Election Commission, appellant in Federal Election Commission v. Americans for Change, Case No. 80-1067, as "FEC." Appellees common to both cases are referred to as such and where appropriate, Common Cause and FEC are described as appellants.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD UNCONSTITUTIONAL SECTION 9012(f) OF THE FUND ACT

In a well-reasoned opinion, the District Court correctly held that Section 9012(f) of the Fund Act violates the First Amendment. That decision represents an appropriate application of this Court's opinion in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*"Buckley"*), and should be affirmed.

A. Section 9012(f) Denies to Individuals and Independent Political Committees Meaningful First Amendment Rights in Presidential Campaigns.

The scope of Section 9012(f) is broad.[4] It covers the activities of the appellee independent political committees and also has a significant impact on the individuals associated with those committees. Despite appellants' efforts to show otherwise, Section 9012(f) imposes a significant burden on free expression and association.

The $1,000 limit of Section 9012(f) prevents independent political committees from engaging in mean-

[4] Section 9012(f)(1) states, in relevant part, that

> . . . it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidate, in an aggregate amount exceeding $1,000.

ingful free speech through the print and electronic media. In presidential elections, which today are so influenced by mass media presentations, $1,000 does not go very far. In terms of buying power, the $1,000 limitation is nearly as effective as a complete prohibition on any expenditure.

To soften the impact of Section 9012(f)'s limitation, appellants assert that Section 9012(f) leaves an individual free to spend unlimited amounts of his own money to further the election of a publicly-financed candidate. Common Cause's Jurisdictional Statement at 24; FEC's Jurisdictional Statement at 17. While this may be true, that "freedom" has little significance for most individuals, for only very wealthy individuals could enjoy that "freedom." The cost of mass electronic and print media takes the individual option away from most persons unless they are permitted to associate in a practical and meaningful manner.

Appellants also assert that individuals may associate informally, without an organized committee, to pool their own money and spend it, without limit, on behalf of a presidential candidate. Common Cause's Jurisdictional Statement at 24; FEC's Jurisdictional Statement at 19.[5] This approach also suffers from bias towards

[5] In their effort to justify Section 9012(f)'s restriction on free speech, by emphasizing the freedom left to individuals to spend unlimited amounts, appellants seem to counter another of their arguments, that the Fund Act's scheme was aimed at eliminating "big money" and the influence it can buy. It is incongruous to leave wealthy individuals unlimited freedom to spend and yet to limit other individuals, who must use political committees to gain meaningful speech, through the $1,000 restriction of Section 9012(f).

wealthy individuals and ignores the practical realities of informal organizations. Although it might be feasible for five millionaires to go together to a television station and buy $500,000 worth of advertising with cash out of their own pockets, 5,000 persons able to put up only $100 each could not achieve the same purchasing feat without some form of organization involving delegated authority.

If appellants' arguments regarding individual and informal group freedoms are considered in the light of the real world, they are not persuasive. Their view opposes the position taken by this Court in *Buckley, supra* at 49, that "[t]he First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." The Constitution does not permit Congress to "restrict the speech of some elements in our society in order to enhance the relative voice of others." *Id.* at 48-49.

In addition to the individual/informal group alternatives already discussed, the FEC points out that Section 9012(f) does not prevent individuals from volunteering their services to candidates and political parties or from making certain contributions. FEC's Jurisdictional Statement at 17-18. However, these alternatives preclude the meaningful impact that the electronic and print media can attain and are slanted towards the political party structures. Those individuals who do not wish to be affiliated with the existing political parties or authorized committees cannot avail themselves of the FEC's suggestions.

This Court held in *Buckley, supra* at 39, that a re-

striction upon the expenditures of individuals and groups "limit[s] political expression 'at the core of our electoral process and of the First Amendment freedoms.' " This Court invalidated a provision of the Federal Election Campaign Act[6] which limited independent expenditures to $1,000 "relative to a clearly identified candidate" in federal campaigns, saying that it "precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association." *Buckley, supra* at 22. In this context, this Court stated that the "constraints on the ability of independent associations . . . to expend resources on political expression 'is simultaneously an interference with the freedom of [their] adherents,' *Sweezy v. New Hampshire*, 354 U.S. 234, 250 . . . (1957) (plurality opinion)." *Buckley, supra* at 22.

Without the option of unrestricted independent expenditures, many individuals and groups would be denied the opportunity to "effectively amplify" their political views in presidential campaigns. Rather than viewing the recent increase in independent political committee activity as a dangerous development, as ap-

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[6] The section in question, former 18 U.S.C. § 608(e)(1), provided that:

> No person may make any expenditure (other than an expenditure made by or on behalf of a candidate within the meaning of subsection (e)(2)(B)) relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000.

pellants do, it should instead be accepted as a new and valuable means of First Amendment expression.

In last year's decision in *Republican National Committee v. Federal Election Commission*, 487 F.Supp. 280, 286 (S.D.N.Y.), *aff'd mem.*, 445 U.S. 955 (1980), the District Court ruled that among the "wide range of ways" supporters of presidential candidates may express themselves is the important mechanism of making expenditures without coordination from a candidate. This ruling was based on this Court's earlier view in *Buckley* that limitations on uncoordinated expenditures are unconstitutional.

Nothing has happened since 1976 to warrant a reversal in approach to limitations on independent expenditures. In their pursuit of meaningful free speech, both individuals and the independent political committees they support financially should be protected from the burdensome restriction of Section 9012(f).

B. Section 9012(f) Cannot be Justified by a Governmental Interest in Eliminating Corruption.

Appellants contend that Section 9012(f) is constitutional because it furthers a governmental interest in eliminating corruption. While such a goal may be a legitimate governmental interest, it must be carefully restricted when it conflicts with fundamental First Amendment liberties.

To establish a case for preserving Section 9012(f), Common Cause and FEC have suggested that dangers of corruption are inherent in the present and future operations of independent political committees such

as those of the appellees in this case. Common Cause's Jurisdictional Statement at 27-28; FEC's Jurisdictional Statement at 26-29. This theory assumes that the activities of all independent political committees should be restricted, whether or not their activities even remotely touch upon the possibility of corruption. The defect of this theory and likewise the defect of Section 9012(f) is that they reach too far. They apply to *all* expenditures in excess of $1,000 furthering the election of presidential candidates by *all* independent political committees and thereby catch in their net both the good and the bad fish.

Congressional regulation and control of corruption in the election context should be designed to reach only possible corruption without unnecessarily restricting the First Amendment rights of many people and groups.[7] The overly broad reach of Section 9012(f) is not justified by a compelling governmental interest.[8] Without a substantial governmental interest to counterbalance the drastic restrictions Section 9012(f) places upon the exercise of free speech and free association by independent political committees and the

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[7] Indeed, it may be that Section 9012(f) is unnecessary because Congress already has acted to control contributions to publicly funded presidential candidates, and this Court has held that expenditures which are actually coordinated with or controlled by a candidate constitute contributions. Buckley v. Valeo, 424 U.S. 1, 46 (1980). Such sham expenditures are subject to FEC enforcement power. Opinion of District Court below, Common Cause's Jurisdictional Statement at 13a, 25a.

[8] In *Buckley, supra* note 7, at 47-48, this Court ruled than an independent expenditure limitation "fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process."

individuals who support them, Section 9012(f) is unconstitutional.

II. A REMAND FOR FURTHER FACTUAL DEVELOPMENT IS UNNECESSARY FOR RESOLUTION OF THE CONSTITUTIONAL ISSUE

Although Common Cause and the FEC agree that the ultimate question before this Court is the constitutionality of Section 9012(f) of the Fund Act, Common Cause asks this Court to delay resolution of that issue while the factual record is expanded in the District Court. Such a delay is unnecessary and could chill the exercise of political free speech until the constitutional issue is again before this Court. Southeastern agrees with the FEC that it is appropriate for this Court to note probable jurisdiction and to decide the case on the present record.

Common Cause's request is inappropriate because it relates only to facts (1) which are not in controversy in this appeal and (2) that are not essential to the adjudication of the constitutionality of 9012(f). Common Cause has asserted that there is no danger from the "small voices" of the individuals who support independent political committees, Common Cause's Jurisdictional Statement at 28. Therefore, the request for discovery into the relationship between the "small voices" and the "political pros" in the committees, *id.* at 14 n. 16, could have no relevance to the danger of corruption feared by Common Cause.

Common Cause has conceded the independence of appellee committees, *id.* at 6 n. 7, and it is thus sufficient that Section 9012(f) is broad enough to include

in its sweep the activities of the appellee committees. Facts that are essential to the adjudication of the validity of Section 9012(f) are in the record.[9]

[9] While, as Common Cause correctly notes, this Court requires a concrete factual setting with an adequate record to sharpen "the deliberative process especially demanded for constitutional decisions," United States v. Automobile Workers, 352 U.S. 567, 591 (1957), this requirement relates to "essential facts." Polk v. Glover, 305 U.S. 5, 10 (1938); Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 213 (1934). Common Cause's reliance on *Automobile Workers, supra*, in its call for further factual development is misplaced because, in contrast to the situation in this appeal, the District Court in that case had not addressed the constitutional issue. Southeastern believes that the constitutional issue presented to this Court by this appeal would not disappear if a remand occurred, and would ultimately return to be decided by this Court.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of the appeals filed by Common Cause and FEC and should affirm the opinion of the District Court below.

Respectfully submitted,

BEN B. BLACKBURN
WAYNE T. ELLIOTT*
ALLEN R. HIRONS

Attorneys for Southeastern Legal Foundation, Amicus Curiae

1800 Century Boulevard, N.E.
Suite 950
Atlanta, Georgia 30345
(404) 325-2255

**Counsel of Record*

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(Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-847

COMMON CAUSE, *et al.*,
Appellants,
v.
HARRISON SCHMITT, *et al.*,
Appellees.

No. 80-1067

FEDERAL ELECTION COMMISSION,
Appellant,
v.
AMERICANS FOR CHANGE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF APPELLANTS COMMON CAUSE, DAVID COHEN AND WINIFRED LONG

MICHAEL L. BURACK
Counsel of Record
ROGER M. WITTEN
BRUCE E. COOLIDGE
CLIFFORD B. HENDLER
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Attorneys for Appellants
Common Cause, David Cohen
and Winifred Long

Of Counsel:
ARCHIBALD COX
KENNETH J. GUIDO, JR.
ELLEN G. BLOCK
DONALD J. SIMON
COMMON CAUSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1200

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QUESTIONS PRESENTED

The Presidential Election Campaign Fund Act provides for public funding of major-party candidates for President in return for their voluntary promises not to accept private financial contributions and not to incur expenses in excess of the public grant. In *Buckley* v. *Valeo*, 424 U.S. 1, 96 (1976), this Court upheld the basic arrangement "as a means of eliminating the improper influence of large private contributions."

The questions presented in this case are:

1. Whether Congress violated the First Amendment by including in the public-financing plan a $1,000 limit on expenditures by an unaffiliated "political committee" "to further the election of" a candidate who has agreed that he and his affiliated committees will not take contributions or incur campaign expenses in excess of his public funds.

2. Whether the congressional justification for limiting such expenditures by unaffiliated "political committees" should have been rejected, and the limit held unconstitutional, upon a motion to dismiss and without development of a factual record.*

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* In addition to the parties named in the captions, the other parties to the proceedings below were plaintiffs-appellants David Cohen and Winifred Long, and defendants-appellees Carl T. Curtis, Americans for an Effective Presidency, and Fund for a Conservative Majority.

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IN THE

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OCTOBER TERM, 1980

No. 80-847

COMMON CAUSE, *et al.*,
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Appellees.

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FEDERAL ELECTION COMMISSION,
Appellant,

v.

AMERICANS FOR CHANGE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF APPELLANTS COMMON CAUSE, DAVID COHEN AND WINIFRED LONG

These consolidated cases appeal a decision of a three-judge United States District Court sitting in the District of Columbia, which held 26 U.S.C. § 9012(f) unconstitutional under the First Amendment. Section 9012(f) is part of the Presidential Election Campaign Fund Act, as amended, 26 U.S.C. ch. 95 ("Fund Act").

OPINION BELOW

The September 30, 1980 opinion and order of the district court are not yet reported. They are reproduced as Appendix A to the Jurisdictional Statement filed in No. 80-847 by appellants Common Cause, David Cohen and Winifred Long ("appellants").[1]

JURISDICTION

The proceedings below consisted of two consolidated civil actions, one brought by appellants (Civil Action No. 80-1609) and the second brought by the Federal Election Commission ("the Commission") (Civil Action No. 80-1754). The actions were heard and decided together by a three-judge district court, pursuant to 26 U.S.C. § 9011 (b) (2). On August 28, 1980 the court entered orders granting appellees' motions for summary judgment and dismissing both actions (Appendices B and C, C.C. App. 31a, 33a). On September 25, 1980, the court entered an order formally consolidating the two cases (Appendix F, C.C. App. 37a). On September 30, 1980 the court issued an opinion and entered a further order disposing of the cases consistently with its earlier orders (C.C. App. 1a, 30a).

Appellants filed timely notices of appeal on September 26, 1980 (Appendices D and E, C.C. App. 35a, 36a) and a timely amended notice of appeal on October 3, 1980 (Appendix G, C.C. App. 39a). Appellants filed a timely Jurisdictional Statement and docketed their appeal in No. 80-847 on November 25, 1980. The Commission docketed its appeal in No. 80-1067 on December 29, 1980.

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[1] Citations to pages of the Appendices To The Jurisdictional Statement filed by appellants are given as "C.C. App. ——."

Appendix I to that Jurisdictional Statement (C.C. App. 69a-84a) is the Amended Complaint, without Exhibits, filed by appellants. The Exhibits to the Amended Complaint could not practicably be reproduced in the main volume of Appendices. They have, accordingly, been lodged with the Court in a separate volume. Citations to pages in that volume are given as "C.C. App. (Supp.) ——."

This Court noted probable jurisdiction in both appeals and consolidated them on February 23, 1981. Jurisdiction over the appeals is conferred by 26 U.S.C. § 9011 (b) (2) and 28 U.S.C. §§ 1252, 1253 and 2101(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment provides, in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ."

26 U.S.C. § 9012(f) provides, in relevant part:

> ". . . [I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000." [2]

STATEMENT OF THE CASE

A. The Statutory Framework.

In 1971 Congress enacted the Presidential Election Campaign Fund Act to provide for public financing as an optional alternative to private fundraising in Presidential general election campaigns. To be eligible for public financing, a major-party candidate must certify

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[2] Appendix H to appellants' Jurisdictional Statement sets forth (1) the text of the Fund Act, of which 26 U.S.C. § 9012(f) is a part (C.C. App. 41a-66a), and (2) related provisions of the Federal Election Campaign Act of 1971, as amended ("FECA"), 2 U.S.C. §§ 441a(b) and 441a(c) (C.C. App. 66a-68a).

that he and his "authorized committees" [3] will not incur aggregate "qualified campaign expenses" [4] in excess of the amount of the public payment [5] and will not accept contributions to defray campaign expenses. 26 U.S.C. §§ 9003(b), 9012(a)(1) & (b)(1).

The section at issue in this case, 26 U.S.C. § 9012(f), complements these provisions by regulating "political committees" that are not "authorized committees" of the publicly financed candidate—*i.e.*, political committees that collect private contributions to support the candidate but are not part of his official campaign. Section 9012(f) limits such political committees to spending $1,000 "to further the election of" the candidate. Section 9012(f) applies only to "political committees," and not to individuals or to other groups.

---

[3] The Fund Act defines a "political committee" as

> "any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office." 26 U.S.C. § 9002(9).

A political committee is an "authorized committee" of candidates for President and Vice President if it is "authorized in writing by such candidates to incur expenses to further the election of such candidates." 26 U.S.C. § 9002(1).

[4] "Qualified campaign expenses" include all campaign-related expenses incurred by the candidate or by his authorized committees. 26 U.S.C. § 9002(11). An expense incurred by a person authorized by the candidate (or by one of his authorized committees) is charged to the candidate (or the committee). *Id.*

[5] The public grant for a particular Presidential general election is equal to $20,000,000, adjusted for changes in the Consumer Price Index. *See* 26 U.S.C. § 9004(a); 2 U.S.C. §§ 441a(b)(1)(B), 441a(c). For the 1980 general election, the public grant was $29,440,000.

B. The Factual Background.[6]

President Reagan, as the 1980 Republican Party candidate, opted for public financing and agreed not to accept private campaign contributions and not to incur campaign expenses in excess of the public grant. Political committees that were not authorized committees of Mr. Reagan thus became subject to Section 9012(f).

Appellees Americans for Change ("AFC"), Americans for an Effective Presidency ("AEP"), and Fund for a Conservative Majority ("FCM") are "political committees" within the meaning of the Fund Act. *See* C.C. App. 74a, 75a, 77a. None was an authorized committee of Mr. Reagan. Each claims to have been independent of the Reagan campaign.[7]

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[6] Because the district court denied appellants' requests for factual development, the district court record contains essentially no information beyond what was in the pleadings. *See* note 21 *infra*. Consequently, some of the figures given later in this section are taken from the "Data Compiled From the Public Records of the Federal Election Commission," which the Commission lodged with this Court on April 28, 1981. Other figures were derived directly from reports filed with the Commission by the respective committees.

[7] We use the terms "the Reagan campaign" and "the official Reagan campaign" to refer to Ronald Reagan, his authorized committees and their agents. His authorized committees included the Reagan For President Committee, the Reagan for President General Election Committee, the Reagan For President Compliance Fund and the 1980 Republican Presidential Unity Committee. (*See* Statement of Candidacy of Ronald Reagan, filed with the Federal Election Commission and dated June 26, 1980.) The Republican National Committee was also an authorized committee and agent of the Reagan campaign. (*See* Exhibit A to Affidavit of William E. Brock, III, filed July 24, 1980, on behalf of the Reagan For Presi-

Notwithstanding Section 9012(f), appellees announced that they intended to collect and spend, in the aggregate, between $26 million and $48 million to further Mr. Reagan's election.[8] To that end, each mounted a nationwide fundraising campaign, primarily through computerized mass mailings. C.C. App. 77a-79a.[9] At least two of the committees operated under, and featured in their fundraising literature, names designed to foster the impression that they were arms of the Reagan campaign.[10] Appellees encouraged contributors to give to them the money that could not lawfully be contributed to Mr. Reagan directly, so that they could spend it on his behalf. For example, AFC's literature stated:

> " 'Reagan for President in '80' is being sponsored by Americans For Change, because federal campaign financing laws prohibit national candidates from ac-

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dent General Election Committee and Ronald Reagan in *Carter-Mondale Reelection Committee* v. *Federal Election Commission*, No. 80-1842 (D.C. Cir. 1980).)

[8] *See* C.C. App. 71a, 77a-79a; C.C. App. (Supp.) 7b. Two of the committees (AFC and AEP) were formed in the summer of 1980 for the specific purpose of raising money to support the Reagan general election campaign.

[9] Solicitation materials were sent to thousands of individuals whose names appeared on mailing lists that appellees purchased, rented or otherwise obtained. *See* C.C. App. (Supp.) 4b-7b, 38b-48b.

[10] AFC operated under the name "Reagan For President in '80." C.C. App. 77a; C.C. App. (Supp.) 4b, 6b, 7b. FCM operated under the name "Citizens For Reagan in '80." C.C. App. 79a; C.C. App. (Supp.) 38b-48b. Appellees' use of these names violated the spirit, if not the letter, of 2 U.S.C. § 432(e)(4) (Supp. III 1979), which prohibits political committees that are not authorized committees of a candidate from using the candidate's name in their titles.

cepting personal contributions since they receive federal funds.' " C.C. App. 4b.[11]

Appellees collected and spent millions of dollars in private contributions to further Mr. Reagan's candidacy. Millions more were collected and spent by other political committees claiming to be independent—most notably, the North Carolina Congressional Club ("NCCC"), operating under the name "Americans for Reagan," and the National Conservative Political Action Committee ("NCPAC"), operating under the name "The Ronald Reagan Victory Fund."[12] These five committees collected more than $21.5 million throughout 1979 and 1980, and approximately $13.7 million during the 1980 general election campaign alone. And they spent $7.75 million to further Mr. Reagan's candidacy during the period following his July 18, 1980 certification for public funds.[13]

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[11] Similarly, FCM's literature stated:

> *"BY LAW YOU CANNOT CONTRIBUTE DIRECTLY TO REAGAN'S CAMPAIGN* NOW THAT HE HAS BEEN NOMINATED.
>
> "SO IT IS OBVIOUS THAT *RONALD REAGAN NEEDS 'CITIZENS FOR REAGAN IN '80'* . . . .
>
> ". . . .
>
> *"RONALD REAGAN NEEDS YOU TO SUPPORT 'CITIZENS FOR REAGAN IN '80' IF HE IS TO BE ELECTED PRESIDENT."*

(*Quoted in* Plaintiffs' Opening Brief on the Merits at 16, filed by appellants in Civil Action No. 80-1609 on August 4, 1980 (emphasis in original).)

[12] *See* Plaintiff Federal Election Commission's Local Rule 1-9(h) Statement of Material Facts As To Which There Is No Genuine Dispute at ¶¶ 42-58, filed by the Commssion in Civil Action No. 80-1754 on August 4, 1980 (hereinafter "FEC Statement").

[13] According to the data compiled by the Commission and lodged with the Court, the following expenditures were made by the five committees:

[Footnote continued on page 8]

Professional political managers ran each committee and decided when, where, and how to spend the money.[14] C.C. App. 77a, 78a, 79a; C.C. App. (Supp.) 6b, 17b-18b. The contributors to the appellee committees had no control over the committees' activities, operations, or spending decisions. Although AFC's managers invited contributors to send in their "thoughts and suggestions," they told the contributors that "[t]he decisions on expenditures must be controlled by the Committee." C.C. App. (Supp.) 6b. FCM's managers just asked for money, and did not invite contributors to send in their views. *Id.* at 38b-48b. AEP's initial press release attempted to create the appearance that the managers sought contributor participa-

[13] [Continued]

	Expenditures Made During 1979 and 1980	Expenditures Made Following Mr. Reagan's July 18, 1980 Certification For Public Financing
AFC	$ 711,856	$ 711,856
AEP	1,270,208	1,270,208
FCM	1,775,535	888,806
NCCC	3,358,796	2,863,179
NCPAC	2,204,052	2,015,583
Total	$9,320,447	$7,749,632

Notes: (1) The figures for FCM cover only through October 15, 1980, because FCM has failed to file reports covering the remainder of the year.

(2) The figures for FCM and NCPAC include expenditures listed as anti-Carter as well as those listed as pro-Reagan.

[14] The managers decided not only what expenditures to make to further Mr. Reagan's election, but also what other candidates to support and how much to contribute to or spend for them. According to the Commission's data, the five committees contributed a total of $394,000 to candidates for Federal offices other than President.

tion through periodic polls and meetings, but there is no evidence (record or otherwise) of any actual participation or control by the contributors.[16] NCPAC's and NCCC's managers similarly gave contributors no role in deciding how their contributions should be spent.[16]

Organizers and managers of the committees had been involved in running past Republican Party presidential campaigns, C.C. App. 76a-77a,[17] and had interlocking relationships with authorized Reagan committees during the 1980 campaign. AFC shared high-level personnel (including officers) with the Republican National Committee, the 1980 Republican Presidential Unity Committee and the Reagan For President Committee, C.C. App. 74a-75a, and took part in the 1980 Republican National Convention. C.C. App. 78a; C.C. App. (Supp.) 11b. High-level personnel moved between AEP and both the Republican National Committee and the Reagan campaign organization. C.C. App. 76a. Appellees also

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[15] According to the release, every contributor would automatically become a "Member" of AEP, and virtually every "Member" could automatically be deemed a "Participating Member." C.C. App. (Supp.) 16b. "Participating Members" were to be "periodically polled and invited to periodic meetings to consider policy questions before the organization." *Id.* at 17b. Because the district court disallowed discovery, the record does not disclose whether any polls were taken or any meetings held.

[16] In the case of NCPAC, the Chairman and Executive Committee made the decisions. *See* FEC Statement, *supra* note 12, ¶ 52. NCCC's management decisions were made by the Chairman and the Executive Director. *See North Carolina's Congressional Club Working Hard for Strong America*, Conservative Digest 16, 17 (Dec. 1980)

[17] One of the managers of the *1980* primary campaign for Mr. Reagan's running mate, George Bush, directed NCPAC's "Ronald Reagan Victory Fund" during the general election campaign. *See NCPAC's Terry Dolan: He's Playing Key Role in New Right's Successes*, Conservative Digest 2, 4 (Dec. 1980); *Evans-Novak Political Report*, May 27, 1980 (No. 386), at 3.

shared common campaign consultants and vendors with the Reagan campaign, as did NCCC and NCPAC.[18]

C. The Proceedings Below.

Appellants and then the Commission filed actions challenging the legality of appellees' activities under Section 9012(f). Both actions sought a declaratory judgment that appellees' activities, whether or not actually independent of the Reagan campaign, violated Section 9012(f).[19] Both requested that a three-judge district court be convened, and the proceedings expedited, pursuant to 26 U.S.C. § 9011(b). Appellants sought immediate discovery.

Appellees opposed discovery and moved for summary judgment and dismissal on the ground that Section

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[18] For example, expenditure and disbursement reports filed with the Commission show that: (1) the Reagan for President Committee, AFC, NCC and NCPAC all shared the same direct mail and telephone solicitation firm; (2) the Reagan for President Committee, NCCC and NCPAC all shared a common political consultant and pollster; (3) the Reagan for President Committee, the Republican Presidential Unity Committee, the Republican National Committee, AFC, FCM and NCPAC all shared the same printing house and office supplier; and (4) AFC and the Republican National Committee shared the same supplier of mailing lists, the same political consulting firm, and the same political telephoning and mailing company.

[19] Appellants' cause of action based on Section 9012(f) was set forth in Count I of their Amended Complaint. *See* C.C. App. 77a-81a. Appellants also alleged, in Count II, that appellees were not in fact independent of the official Reagan campaign and that their expenditures should therefore be treated as contributions to and expenditures by the campaign. *See* C.C. App. 81a-82a. Appellants renewed that allegation in a still-pending administrative complaint filed with the Commission pursuant to 2 U.S.C. § 437g (Supp. III 1979), and are not appealing the district court's dismissal of Count II for lack of jurisdiction and failure to state a claim. Thus, for purposes of this appeal, we assume *arguendo* that the expenditures of AFC, AEP and FCM are not to be charged to the official Reagan campaign or treated as contributions to it.

9012(f) is unconstitutional.[20] The district court stayed all discovery.[21] Relying on *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the court held Section 9012(f) unconstitutional under the First Amendment without developing any factual record.[22]

SUMMARY OF ARGUMENT

Section 9012(f), which imposes a $1,000 limit on expenditures by unauthorized political committees to further the election of a publicly financed Presidential candidate, is an essential part of the Fund Act's system of public financing for Presidential general election campaigns—a system that "furthers, not abridges, pertinent First Amendment values." *Buckley* v. *Valeo*, 424 U.S. at 93 (footnote omitted). This Court has previously

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[20] Appellees and the Commission also moved to dismiss appellants' action on the ground that the action, as it then stood, impinged upon the Commission's jurisdiction over the enforcement of the federal election laws, notwithstanding the plain language of 26 U.S.C. § 9011(b). The district court dismissed Count II (but not Count I) of appellants' action on this ground.

[21] Thus, the record before the district court consisted essentially of (1) the allegations in, and the exhibits to, appellants' Amended Complaint, (2) the allegations in the Commission's Complaint, (3) additional factual allegations (together with supporting citations) set forth in Plaintiffs' Opening Brief on the Merits, filed by appellants in Civil Action No. 80-1609 on August 4, 1980, and (4) the documentation submitted by the Commission on August 4, 1980 in support of its motion for summary judgment. In addition, AFC submitted a conclusory affidavit of its Chairman, Senator Harrison Schmitt, on August 4, 1980. Appellants were not allowed to conduct discovery concerning the matters discussed in the affidavit.

[22] The court granted summary judgment for appellees in the Commission's action. C.C. App. 30a. It then dismissed Count I of appellants' action "as mooted pursuant to our decision in the FEC action." *Id.* at 25a. *See also id.* at 30a. Count II of appellants' action, which is not involved in this appeal, was dismissed for lack of jurisdiction and failure to state a claim. C.C. App. 31a. *See* note 19 *supra*.

sustained the Fund Act's ceiling on campaign expenditures by a publicly financed candidate, and the Court has indicated that other limits on expenditures in candidate elections are constitutionally permissible if they serve a compelling governmental purpose, are narrowly tailored to achieve that purpose, and do not unnecessarily interfere with speech and associational freedoms. Section 9012(f), which differs in every material respect from the broad "independent expenditure" limitation overturned in *Buckley*, satisfies this test and is therefore constitutional.

Section 9012(f) serves an extremely compelling governmental interest—protecting the Presidency from the corrosive effects of large aggregations of financial power. It preserves the integrity of, and public confidence in, the Presidency by minimizing the risk that publicly funded candidates will become beholden to fundraisers who amass and control large political funds for the candidate's benefit. In addition, the Section prevents evasion of the Fund Act's ban on direct contributions to such candidates—a ban that this Court has previously sustained. Eliminating Section 9012(f) would, moreover, utterly frustrate Congress' intent that public financing serve as an optional substitute for, rather than a supplement to, private fundraising.

Section 9012(f) is narrowly drawn to accomplish the objective of preserving governmental integrity. It applies only to "political committees," whose ability to accumulate and funnel huge sums of money poses the greatest threat to the independence and integrity of publicly financed Presidential candidates. The Section places no limit whatsoever on the speech and associational freedoms of individuals or of groups that are not "political committees."

Section 9012(f) does not unnecessarily interfere with the exercise of speech and associational freedoms by anyone. It leaves everyone free to speak and associate effec-

tively in Presidential campaigns. The only associational interests that Section 9012(f) in any way affects are the "marginal" interests inherent in contributions to political committees, 424 U.S. at 20, and, under *Buckley*, Congress may limit those interests in order to preserve governmental integrity.

This Court should accept Congress' judgment concerning the need for Section 9012(f), particularly since Congress has special expertise in this area. If, however, the Court is not satisfied that Congress' judgment was justified, the Court should vacate the decision below and remand the case to the district court with directions to take evidence, hear testimony, and apply the correct constitutional standard to the record as developed.

ARGUMENT

I. SECTION 9012(f) DOES NOT VIOLATE THE FIRST AMENDMENT.

Although this case arose during the 1980 election, the central constitutional question will affect Presidential elections and confidence in representative government for years to come. The Court below held that the First Amendment renders Congress powerless to protect the integrity of the Presidency and the efficacy of public financing from the effects of campaign finance practices that Congress properly found to be corrosive. We submit that Congress does have power to enact appropriate legislation that serves these paramount interests, even if it has the effect of curbing some avenues of association and expression. In particular, where the statute does not censor ideas or suppress information, or even limit the money potentially available for speech, it should be found constitutional if it is narrowly tailored to accomplish its goals and the interests it serves outweigh any limitation on the ways of raising and spending money for campaign speech. Section 9012(f) meets this test.

Buckley v. *Valeo* sustained the constitutionality of the basic system of public financing for Presidential general election campaigns. In *Buckley* the Court observed that the Fund Act

> "is a congressional effort not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [the Fund Act] *furthers, not abridges, pertinent First Amendment values.*" 424 U.S. at 92-93 (emphasis added; footnotes omitted).

Buckley also held that Congress did not violate the First Amendment by banning private contributions to publicly funded Presidential campaigns, or by prohibiting publicly funded campaigns from making expenditures in excess of the public subvention. *Id.* at 57 n.65. *Accord, Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980).

The court below mistakenly supposed that invalidation of Section 9012(f) was dictated by an aspect of the decision in *Buckley* that did not involve the Fund Act. *Buckley* overturned an across-the-board prohibition against any "independent expenditure" in excess of $1,000 in any Federal election, whether or not publicly funded. *See* 424 U.S. at 39-40. That broad prohibition, which encompassed personal expenditures by individuals (whether acting singly or jointly) to publicize their own ideas and views, was held unconstitutional because it did not "presently appear" to the Court that those expenditures posed any serious dangers to the integrity of elected Federal officeholders or to public confidence in government. *Id.* at 46.

This case is altogether different. Section 9012(f) is narrow. No one here is complaining, or could complain, that Section 9012(f) curtails his right of personal speech.

Section 9012(f) reaches only "political committees," and it applies only to publicly financed Presidential campaigns for which the candidate has agreed not to accept or spend private contributions. The kinds of dangers that were not "presently apparent" in *Buckley* are present here. Nationwide, privately financed, million-dollar shadow campaigns like those of appellees pose obvious threats to the independence of publicly funded candidates.

Common sense and experience confirm Congress' expert determination that Section 9012(f) is needed. Section 9012(f) should therefore be upheld as an essential bulwark of the public financing plan enacted by Congress to protect the integrity of the Presidency and preserve public confidence in representative government.

A. The First Amendment Permits Limits on Campaign-Related Expenditures Where Necessary To Achieve Compelling Public Purposes Unrelated to the Suppression of Ideas or Information.

First Amendment freedoms are not absolute. In *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 535 (1980), the Court observed:

> "The Commission's ban on bill inserts [that discuss controversial political and public issues] is not, of course, invalid merely because it imposes a limitation upon speech."

Accord, First National Bank of Boston v. *Bellotti*, 435 U.S. 765, 786 (1978).

The First Amendment affords the greatest protection against governmental attempts to censor speech or suppress ideas because of some supposed danger flowing from their effect on the minds or conduct of the audience. Such censorial restrictions on speech can be justified only in very narrow circumstances—for example, by

proof of an overwhelming public exigency, or of the utter worthlessness of the message.[23] The strict rule against censorship and suppression applies most strongly in the realm of political debate, and it follows directly from the most fundamental proposition in the philosophy behind the First Amendment—that no branch of government, whether legislative or executive or judicial, may judge the relative danger or worth of ideas or information pertaining to government, politics or other matters of public importance in terms of their effect on listeners' minds. *Bellotti*, 435 U.S. at 791 & n.31.

A less strict First Amendment standard applies to restrictions on speech or expressive activity that are designed to obviate serious public evils other than dangers supposedly inherent in the content and impact upon the public of the ideas or information expressed.[24] Here,

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[23] *See, e.g., Miller* v. *California*, 413 U.S. 15 (1973) (obscenity); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572-73 (1942) (fighting words); *Whitney* v. *California*, 274 U.S. 357, 373-78 (1927) (Brandeis, J., concurring).

[24] The distinction is *not* between words and conduct. The difference that we emphasize is readily illustrated. Legislation might restrict the amount of paper available for newsprint. If the only justification available were that the newspapers were undermining confidence in the government by disseminating dangerous political information or ideas, the Court could invalidate the statute without weighing the justification. On the other hand, if the legislation were the result of a wartime shortage of paper required for other essential needs, the very same restriction would be upheld if the public need for rationing paper outweighed the impact upon expression. *Cf. Branzburg* v. *Hayes*, 408 U.S. 665 (1972); *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); *Associated Press* v. *NLRB*, 301 U.S. 103, 132 (1937). Similarly, a tax on or regulation of speech-related conduct will be judged with severity if its function is simply to curtail publication, *cf. Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936), while even the utterance of words or distribution of leaflets may be subordinated to other public interests at a particular time or place

there is room for balancing. The accepted test of constitutionality in such cases is to inquire whether the regulation serves an "important" or "compelling" or "paramount" public purpose. Even a statute that directly restricts the speech of a private person may be sustained if the statute is "a narrowly tailored means of serving a compelling state interest." *Consolidated Edison Co.*, 447 U.S. at 535. *Accord, id.* at 540 (*citing Bellotti*, 435 U.S. at 786, *and Buckley*, 424 U.S. at 25).[25]

Prior decisions of this Court show that the less strict standard—which weighs the justification against the burden—applies to campaign finance regulations, whether they affect "contributions" or "expenditures."[26] *Buckley* held that the same interests that support Section 9012(f) were sufficiently compelling to outweigh the interference with First Amendment freedoms worked by contribution limitations. 424 U.S. at 29. The Court similarly weighed

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so long as the government does not "undertake[] selectively to shield the public from some kinds of speech on the ground that they are more offensive than others . . . ." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975).

[25] The same test applies to statutes that directly restrict associational freedoms, even in the context of political campaigns. As this Court stated in *Buckley*:

> "Even a '"significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." 424 U.S. at 25 (citations omitted).

See also Democratic Party v. *LaFollette*, 101 S. Ct. 1010, 1020 (1981); *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 567 (1973).

[26] Lower courts deciding constitutional challenges to campaign finance regulations have likewise weighed the importance of the governmental interests at stake against any arguable infringements on First Amendment freedoms. *See, e.g., Bread Political Action Committee* v. *Federal Election Commission*, 635 F.2d 621, 627-29 (7th Cir. 1980) (*en banc*), *appeal docketed*, 49 U.S.L.W. 3685 (1981).

competing interests in considering both the particular expenditure limitations at issue in *Buckley*[27] and also the ban on expenditures by corporations to influence the outcome of referenda at issue in *Bellotti*.[28] And the Court has struck the balance in favor of some limits on campaign expenditures—including the Fund Act's ceiling on overall expenditures incurred by a publicly financed Presidential campaign. *See* p. 14 *supra*.[29]

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[27] *See, e.g.*, 424 U.S. at 47-48 (the particular "independent expenditure" ceiling fails to serve a substantial governmental interest and heavily burdens protected expression); *id.* at 53-54 (limitation on a candidate's expenditure of his own personal funds is not sufficiently supported by the governmental interest in preventing actual and apparent corruption to justify infringement of his First Amendment rights); *id.* at 55-56 (the governmental interests advanced to support the limitation on overall campaign expenses are not sufficient to justify restricting the quantity of political expression).

Nothing in the introductory "General Principles" discussion in *Buckley, id.* at 14-23, suggests that the Court meant to depart from this generally applicable approach in determining the constitutionality of particular expenditure limitations. To be sure, the discussion emphasized that expenditure limits impinge on protected First Amendment freedoms. But that proposition is only the start of the constitutional inquiry. The degree of impingement must then be weighed against the justification for the limits, as was done later in the *Buckley* opinion.

[28] *See, e.g.*, 435 U.S. at 795 (invalidating the ban because it prohibits protected speech "in a manner unjustified by a compelling state interest . . .").

Section 9012(f) differs importantly from the kinds of restrictions on the political uses of money in referenda that were before the Court in *Bellotti* and that are now before it in *Citizens Against Rent Control/Coalition for Fair Housing* v. *City of Berkeley, prob. juris. noted*, 49 U.S.L.W. 3616 (U.S. Feb. 23, 1981) (No. 80-737). "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." *Bellotti*, 435 U.S. at 790 (citations and footnote omitted).

[29] *See* Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 361 (1977) ("[T]here is enduring significance in the acceptance of limitations on expenditures as a permissible con-

The less strict standard applies to Section 9012(f), because the Section is not designed to, and does not, censor or suppress speech thought to have a dangerous impact on its listeners.[30] Section 9012(f) is concerned, instead, with obligations actually or apparently incurred by a candidate; it seeks to eliminate the threats to governmental integrity and public confidence that arise when the managers of political committees amass and spend large private funds to help a publicly financed candidate.

The *Buckley* ruling upholding the contribution ceilings is closely in point here. Although phrased in terms of "expenditures," Section 9012(f) functions as a limitation on the operations of private fundraising organizations—political committees that solicit and collect private contributions to support a publicly funded candidate. The Section's effect upon the speech and associational rights of contributors is, for all substantial purposes, the same as that of the contribution ceilings in *Buckley*. In this case, as in *Buckley*, the contributor seeks only to pay for the speech of another—for speech that the contributor neither composes, nor publishes, nor controls. *See* pp. 8-9 *supra;* 424

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dition for public financing, [since] it seems plain enough that the Court would never have accepted a condition of financing that prohibited discussion of certain topics . . . ."). The Court also upheld, in *Buckley*, a $1,000 limit on campaign expenditures made by an individual at the request or with the consent of a candidate, even when the individual made the expenditure to publish his personal views. 424 U.S. at 46-47 & n.53.

[30] To be sure, Section 9012(f) reaches only "expenditures to further the election of" Presidential candidates who have accepted public financing. But the purpose in limiting the statute's reach is to tailor the proscription narrowly to the kinds of expenditures most likely to put the candidates under obligation, or appear to do so. Congress obviously was not attempting to censor particular ideas or information, or to give the expression of some messages forums or opportunities denied to others. *Compare Fowler* v. *Rhode Island*, 345 U.S. 67, 69-70 (1953); *Niemotko* v. *Maryland*, 340 U.S. 268, 272 (1951); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941).

U.S. at 21. Under the provisions upheld in *Buckley*, the size of the contributor's gift is limited; in this case, his opportunity to give is lessened chiefly by the candidate's decision to substitute public funds but also by Section 9012(f)'s limitation on the sums that any one political committee may spend. Like the contribution ceilings upheld in *Buckley*, Section 9012(f) "does not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.* at 21. *Accord, id.* at 58. Because it leaves everyone free to spend without limit for personal speech, Section 9012(f), like the contribution ceilings, does not "reduce the total amount of money potentially available to promote political expression," *id.* at 22, even though (again like the contribution ceilings) it may result in less money actually being spent. And Section 9012(f), like the contribution ceilings, is consistent with the First Amendment because it serves a compelling public purpose quite apart from the content or impact of words or ideas—protecting the integrity of government and public confidence in it.

The character of political committees like appellees, and the scale of their fundraising and spending, differentiate their expenditures from the individual "independent expenditures" that the Court held Congress could not prohibit on the record made in *Buckley*. That holding centered on the impact that Section 608(e)(1) of the FECA amendments had on individuals (whether acting singly or jointly) who desired to spend their own money to publish their own words and ideas. The *Buckley* opinion makes clear that the Court's attention was focused on situations in which the speakers were individuals paying for and expressing their own personal views, rather than professionally run partisan political fundraising operations using other people's money to reinforce the candidate's campaign. *See, e.g.*, 424 U.S. at 27 n.29, 48 n.54.[31] In the latter case, those who give the money are

[31] That the *Buckley* Court had in mind individual and personal expression is further demonstrated by its analogy of the expendi-

not engaging in personal expression; as in the case of a contribution directly to a candidate, there is "only a marginal restriction upon the contributor's ability to engage in free communication" because "the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 20-21. Moreover, in the situations at which Section 9012(f) aims—"independent" campaigns by professional committees such as appellees—there is scant likelihood that expenditures will "provide little assistance" to the candidate or "prove counterproductive," as appeared to be the case in *Buckley*. *Id.* at 47. Common sense and evidence point to the conclusion that committees such as appellees will provide substantial and valuable assistance to the candidate's campaign. *See* pp. 6-10 *supra* and 27-34 *infra*. Here, unlike in *Buckley*, there is ample reason to believe that expenditures pose a "danger that [they] will be given as a *quid pro quo* for improper commitments from the candidate." 424 U.S. at 47.

The Court's opinions, both before and after *Buckley*, confirm the difference between personal expenditures and expenditures by centrally managed massed funds. The opinions show keen appreciation of the danger that aggregated financial power poses. In *United States* v. *Automobile Workers*, 352 U.S. 567 (1957), Justice Frankfurter traced the long history of the "popular feeling that aggregated capital unduly influenced politics, an influence not stopping short of corruption." *Id.* at 570. Later, in *Pipefitters Local 562* v. *United States*, 407 U.S.

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ture limitations then before it to a single-tank limit on one's freedom to drive an automobile. 424 U.S. at 19 n.18. The analogy was apt, because the particular expenditure limitations in *Buckley* had the effect of limiting personal activity. Section 9012(f), however, does not. To continue the analogy, Section 9012(f) leaves all individuals and groups free to engage in unlimited personal driving and car-pooling; it reaches only situations where strangers pay for a bus ticket and then leave the driving to someone else.

385, 443 (1973), Justice Powell warned of the dangers of "reversing a trend since 1907, [and] open[ing] the way for major participation in politics by the largest aggregations of economic power, the great unions and corporations." Still more recently, in *Bellotti* the Court observed:

> "The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts . . . . The importance of the governmental interest in preventing this occurrence has never been doubted. . . . *Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections. Cf. Buckley v. Valeo, supra,* at 46 . . . ." 435 U.S. at 788 n.26 (emphasis added; citations omitted).

Moreover, lower Federal courts have sustained restrictions on expenditures by corporations and labor unions to influence candidate elections,[32] and this Court, despite opportunities to do so, has never held to the contrary. *See, e.g., United States* v. *Automobile Workers, supra; United States* v. *C.I.O.*, 335 U.S. 106 (1948). Expenditures from the amassed wealth of "independent" political committees pose the same dangers of undue influence and political debts as do expenditures by corporations and labor unions.

The danger of political indebtedness through large expenditures of aggregated funds is particularly great in

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[32] *See, e.g., United States* v. *Chestnut*, 533 F.2d 40, 50-51, (2d Cir. 1976), *aff'g* 394 F. Supp. 581, 588-91 (S.D.N.Y. 1975), *cert. denied*, 429 U.S. 829 (1976); *United States* v. *Boyle*, 482 F.2d 755, 763-64 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973); *Federal Election Commission* v. *National Right to Work Committee*, 501 F. Supp. 422, 437-38 (D.D.C. 1980) (*appeal pending*, D.C. Cir., No. 80-1487); *Federal Election Commission* v. *Weinsten*, 462 F. Supp. 243, 246-49 (S.D.N.Y. 1978).

the case of a publicly financed candidate, who may not take contributions and whose total campaign resources are limited by his decision to accept the public grant. Only Section 9012(f) is available to meet the threat that a publicly financed candidate, wittingly or unwittingly, will be put under heavy obligation to the managers of political committees who raise and spend millions of additional dollars to help him get elected.

B. Section 9012(f) Serves the Compelling Governmental Interest of Preserving the Integrity of, and Public Confidence in, the Presidency.

Starting in 1907, many Congresses have passed, and Presidents have signed, legislation designed to safeguard the integrity of elected Federal officeholders—and above all, the President.[33] Through these measures, the Political Branches—acting on the basis of their special knowledge, and supported by widespread public concern over corruption in government—have sought to deal with a recurring evil that this Court recognized a century ago: "the free use of money in elections." *Ex Parte Yarbrough*, 110 U.S. 651, 667 (1884). *See also United States* v. *Automobile Workers*, 352 U.S. at 575 (referring to the "continuing congressional concern for elections 'free from the power of money' ").

The Judicial Branch also has long recognized that preserving the integrity (and the appearance of integrity) of elected Federal officeholders is a most important governmental interest. In *Burroughs* v. *United States*, 290 U.S. 534 (1934), this Court, in sustaining the constitutionality of the Federal Corrupt Practices Act of 1925 as applied to Presidential elections, said:

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[33] *See* Justice Frankfurter's discussion of the history of these enactments in *United States* v. *Automobile Workers*, 352 U.S. at 570-83. *See also Pipefitters Local 562* v. *United States*, 407 U.S. at 402-13; *United States* v. *C.I.O.*, 335 U.S. at 113-15; *Burroughs* v. *United States*, 290 U.S. 534, 544-48 (1934).

> "The President is vested with the executive power of the nation. *The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated.* To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection." *Id.* at 545 (emphasis added).

The Court similarly emphasized the importance of preserving the *appearance* of governmental integrity in *Civil Service Commission* v. *Letter Carriers*, 413 U.S. at 565, which sustained the Hatch Act's broad restrictions on political activities by federal employees. And *Buckley* made the point again:

> "It cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest. S. Rep. No. 93-689, pp. 4-5 (1974)." 424 U.S. at 96.

As we now show, Section 9012(f) serves this same compelling interest.

1. *Congress Enacted the Fund Act as a Means of Protecting the Presidency from the Corrosive Effects of Private Financial Support.*

The Fund Act was enacted because private money was corrupting the Nation's electoral and governmental processes. "[T]he deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one." *Buckley*, 424 U.S. at 27 (footnote omitted).[34] By offering a Presidential candidate the option of

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[34] The Fund Act's system of public financing was, unfortunately, not in operation in 1972. It took effect the following year, *see* 26 U.S.C. § 9013, and first applied to the 1976 Presidential election.

receiving a generous public grant at the outset of the general election campaign, the Fund Act creates a strong incentive for the candidate to forswear private fund-raising, thus eliminating the likelihood that he would find himself beholden to private benefactors:

> "If the candidate chooses to accept public financing he or she is beholden unto no person and, if elected, should feel no post-election obligation toward any contributor of the type that might have existed as a result of a privately financed campaign." *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. at 284.

The legislative history fully reflects this purpose. The Fund Act's sponsor, Senator Pastore, stated it most eloquently:

> ". . . We are trying to rid this Government of the power of money and give it back to one man, one vote, one dollar. That is all we are talking about." 117 Cong. Rec. 42408 (1971).
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> * * * *
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> "The principle is still the same. It is the public financing of a Presidential campaign . . . . [A]ll we are saying is, 'Let's be done with it. Let the President be a free and independent man. Let him not be beholden to anyone.' " 119 Cong. Rec. 38900 (1973).[35]

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[35] These views were widely shared and echoed by other legislators. For example:

> "Whether we like it or not . . . politicians who become elected officials become beholden in the process to some special economic interest. This is the issue before the Senate. *Preserving the independence of the President is absolutely vital.* The Pastore amendment [*i.e.*, the Fund Act] would achieve that end." 117 Cong. Rec. 41938 (1971) (remarks of Senator Mansfield) (emphasis added).

Accord, e.g., id. at 41780 ("Big money buys entree. Big money buys favors. Favoritism, legal or otherwise, perverts the democratic process.") (remarks of Senator Eagleton).

And Senator Bentsen stressed that the "most compelling reason [why] we should enact legislation which permits a form of public financing of campaign funding" is to end "the deterioration of confidence of the people in their public officials." 117 Cong. Rec. 41767 (1971).[36]

The evils that Congress sought to eliminate were posed by private fundraising organizations as well as by large individual contributions. Congress therefore designed the Fund Act to enable the Nation

> "to have a President elected who would be able to make his appointments without determining that he has to send this man as an ambassador there because he raised $100,000, *or to do this for this group because of the money they raised.*" 117 Cong. Rec. 41945 (1971) (emphasis added) (remarks of Senator Chiles).

Without Section 9012(f), the Fund Act would fail to achieve Congress' goal.

2. *Section 9012(f) Is an Important and Necessary Part of the Fund Act.*

a. *Section 9012(f) Eliminates the Danger That Publicly Financed Presidential Candidates Will Be, or Appear To Be, Beholden to Private Fundraisers.*

Congress correctly found that a Presidential candidate who opts for public financing (and whose campaign expenditures are therefore limited to the amount of the public grant) could become obligated—or appear to be obligated—to political committees that raise and spend

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[36] The concern for public confidence in government was also widely shared: "Money in elections . . . threatens to undermine public confidence in those who are elected, and thus in the institution of government itself . . . ." *Id.* at 41778 (remarks of Senator Kennedy, *quoting* Senator Gore). *Accord, e.g.*, 117 Cong. Rec. 41780 (1971) (remarks of Senator Hart).

additional millions to help elect him. The risk of obligation is just as great as that created by large contributions. Indeed, fundraisers who manage committees such as appellees wield *more* power and influence than do individual contributors, as one of AEP's own "Media Directors" has acknowledged:

> "I think *it has always been true, however, that the people who wield the authority coming out of private fundraising are not the people who give the money so much as the people who raise the money, and that has not significantly changed.* If anything, it may have been accelerated [by the $1,000 limit on contributions] because *the guy who can raise $51,000 in contributions is the guy who is incredibly important to that campaign and therefore has a significant amount of power.*" [37]

The power that the fundraiser-manager of a political committee wields is not diminished simply because the committee is "independent." The operators of "independent" committees can acquire great influence with the candidate and his staff by financing and running consciously parallel campaigns. Appellees, for example, billed themselves as acting on behalf of Mr. Reagan [38] and promoted themselves as surrogates for the private campaign coffers that Mr. Reagan closed when he chose to receive public financing.[39] They filled in gaps for, and thus reinforced, the official Reagan campaign.[40] They

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[37] Deposition of Douglas L. Bailey at 28 in *Republican National Committee* v. *Federal Election Commission, supra* (emphasis added). *See* C.C. App. 76a-77a; C.C. App. (Supp.) 18b.

[38] Indeed, AFC expressly stated that its "newly founded 'Reagan for President in '80' project [was] established to raise over $20 million *on behalf of Ronald Reagan.*" C.C. App. (Supp.) 76 (emphasis added). *See also* note 10 *supra.*

[39] *See* pp. 6-7 and note 11 *supra.*

[40] FCM, for example, monitored the Reagan campaign throughout the country (both in the primaries and in the general election) and moved in with infusions of money, manpower and ad-

adapted their activities to the Reagan campaign strategy, relying on information released by the official campaign,[41] which in turn was well aware of appellees' operations.[42] Thus, a candidate's "independent" benefactors know perfectly well how to help him, and the candidate knows who is helping him and how much help he is getting:

> "The new professional staffs in PAC's . . . should not have much difficulty calculating from the candidate's own campaign strategy which kinds of independent expenditures would be most helpful to *and appreciated by him.*
>
> ". . . If PAC's can develop unrevealing names (*e.g.*, Citizens for Good Government), independent expenditures may become a relatively attractive campaign device. *Voters will not be likely to learn the*

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vertising in critical areas. *See The Boston Globe*, May 28, 1980, at 1 (New Hampshire, Pennsylvania and Texas primaries); Nyhan, *Sen. Don Nickles' Victory Given a Big Boost by Fund for Conservative Majority*, Conservative Digest 11, 12 (Jan. 1981) (large general election expenditures in Connecticut, New York Pennsylvania and Florida). Similarly, NCPAC's "Ronald Reagan Victory Fund" concentrated on Mississippi, Louisiana, Alabama, Texas, Illinois and Florida "because [the] Reagan effort needed bolstering" in those states. *NCPAC's Terry Dolan: He's Playing Key Role in New Right's Successes*, Conservative Digest 2, 4-5 (Dec. 1980).

[41] The Treasurer of FCM stated that "we pretty much know what the Reagan campaign strategy is from the newspapers." *The New York Times*, June 30, 1980, at B13, col. 4.

[42] The Reagan campaign learned about appellees' activities the way that appellees learned about the campaign's activities—through the newspapers. *See, e.g., The Washington Post*, July 10, 1980 at A3, col. 1 (describing the proposed activities of AEP); *The Los Angeles Times*, June 6, 1980 at 6, col. 5 (AFC); *The New York Times*, September 25, 1980, at B10 col. 6 (FCM); *The Boston Globe*, May 28, 1980 at 1, col. 6 (FCM); *The Washington Post*, June 6, 1980 at 1, col. 2 (AFC).

> *sources of these efforts, but the candidates whom PAC's wish to influence certainly will.*" [43]

Expenditures by "independent" political committees thus pose a real danger of creating (and appearing to create) political debts.

The district court erred in reaching a contrary conclusion. In ruling that Section 9012(f) is not supported by a sufficiently compelling governmental interest, the district court focused solely on the committees' essentially anonymous contributors, stating that it could not "imagine how the thousands of 'small voices' associated together in a political committee could compromise a candidate for President." C.C. App. 19a-20a. The court somehow missed the obvious influence acquired by the handful of fundraiser-managers who run the political committees and control the aggregated funds. But it is with those managers—and not with the contributors—that the real leverage (and thus the real danger) lies:

> "The real or effective financial constituency in these circumstances is the PAC and its leadership, not the small givers to PAC campaign warchests. The candidate knows the programs and objectives of the PAC, and it is to the PAC officers that preferred access is given." [44]

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[43] Adamany, *PAC's and the Democratic Financing of Politics*, 22 Ariz. L. Rev. 569, 601 (1980) (emphasis added). Mr. Adamany, a recognized expert on campaign finance, has also noted that large independent expenditures give rise to the *appearance* of impropriety:

> "[I]ndependent expenditures will be taken by a large segment of the public as evidence of liaison between officeholders and spenders, who will be assumed to have acquired some influence over public policy as a consequence of their outlays." *Id.* at 586 n.135.

[44] *Id.* at 596. In fact, such "preferred access" to the White House has already been given to the fundraiser-managers of two "independent" political committees—Robert C. Heckman, the

b. *Section 9012(f) Prevents Evasion of the Fund Act's Ban on Private Contributions to, and Its Limit on Expenditures by, Publicly Financed Presidential Candidates.*

Committees such as appellees are obvious vehicles for evading the Fund Act's ban on private contributions to, and its limit on expenditures by, a publicly financed campaign. The Congress that enacted the Fund Act in 1971 knew first-hand that "independent" political committees were traditional vehicles for evading then-existing Federal limits on campaign contributions and expenditures:

> "These federal ceilings on both contributions and expenditures were widely circumvented through the proliferation of committees. Committees openly supporting candidates called themselves independent, claiming to operate without the knowledge or consent of the candidates. . . . Often they were vest pocket committees." [45]

This proliferation of "independent" committees was one of the primary evils that the election-law reforms of 1971 were designed to rectify:

> "[P]rior to 1971 the laws regulating Federal campaigns permitted an infinite proliferation of *political committees which were ostensibly separate entities but which were in fact a means for advancing a candidate's campaign.* That deficiency brought the campaign laws into disrepute and provided an essential predicate for the 1971 and 1974 reforms that the Congress enacted." [46]

Chairman of FCM (*see* C.C. App. (Supp.) 44b) and John T. Dolan, the Chairman of NCPAC. *See The New York Times*, Mar. 8, 1981, at 24, col. 1.

[45] Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. at 365.

[46] H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 5 (1976) (emphasis added). The same point was made in the floor debate on the Fund Act:

Congress was right in concluding that "independent" political committees are ready tools for circumventing the law. Coordination can easily be effected surreptitiously through persons who hold positions with both an "independent" committee and one or more of the candidate's authorized committees (as some of appellees' personnel have done);[47] through interlocking campaign consultants, vendors and suppliers who work for both an "independent" committee and the official campaign (as some of appellees' consultants and vendors did);[48] through "indirect" communications between persons who work for an "independent" committee and others on the staff of the official campaign (as have taken place here);[49] and

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"In mentioning political committee, as the present terms of the bill does, the desire, of course, *is to prevent any political committees from being formed as a subterfuge* . . . ." 117 Cong. Rec. 42397 (1971) (remarks of Senator Taft).

[47] For example, the Assistant Treasurer of AFC was concurrently the Treasurer of the 1980 Republican Presidential Unity Committee and a consultant to the Republican National Committee; members of the AFC steering committee served concurrently on various arms of the Republican National Committee and the Reagan for President Committee. C.C. App. 75a; *see* note 7, *supra*. Similarly, two of the organizers of AEP took full-time positions on the official Reagan campaign. C.C. App. 76a.

[48] See note 18 *supra*.

[49] A blatant example of such communications was described by NCCC's "honorary chairman," Senator Jesse Helms, in a television interview:

"Well, as you may know, we have an independent effort going on in North Carolina. Uh, the law forbids me to consult with him [Mr. Reagan], and it's been an awkward situation. I've had to, sort of, uh, talk indirectly with Paul Laxalt [Mr. Reagan's campaign Chairman] and hope that he would pass along . . . uh, and I . . . I think the messages have gotten through all right . . . ."

(*Quoted in* Plaintiffs' Opening Brief on the Merits, *supra* note 11, at 27 n.28.)

through an "independent" committee's use of the facilities of, and campaign materials derived from, the candidate's official campaign (as has also happened here).[50]

Because of the ease with which "independent" political committees could evade the Fund Act's requirements and the near-impossibility of proving clandestine coordination in time to enjoin it, a prophylactic rule was required.[51] Congress therefore enacted Section 9012(f), in full accord with this Court's admonition not to "naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence . . . ." *Buckley*, 424 U.S. at 45.

c. *Section 9012(f) Effectuates Congress' Intent That Public Financing Be an Alternative to Privately Financed Campaigns.*

Congress intended public financing to serve as a substitute for, and not a supplement to, privately raised

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[50] For example, AFC used press facilities of, and was on the official program at, the 1980 Republican National Convention. *See* C.C. App. 78a; C.C. App. (Supp.) 11b. Similarly, FCM acquired and used a mailing list of 180,000 names that had been compiled by an earlier Reagan campaign. *See The New York Times*, June 30, 1980, at B13, col. 3. Assistance flowed the other way as well. Campaign materials prepared by the NCCC "Americans for Reagan" project were distributed at Reagan-Bush Committee offices as well as at local Republican Party headquarters. *See* Affidavit of David Schwartzbaum, Oct. 18, 1980; Affidavit of Peter Butzin, Nov. 6, 1980. (The affidavits were submitted to the Commission by Common Cause on November 17, 1980.)

[51] Coordination, like conspiracy, is very difficult and time-consuming to prove. The few months that elapse from the start to the end of the general election campaign almost certainly will not provide enough time to develop proof of coordination. That would be true even under procedures far more accelerated than those the Commission follows. *See* 2 U.S.C. § 437g (Supp. III 1979). (Indeed, Common Cause's own complaint against appellees and similar committees has been before the Commission now for over seven months. *See* note 19 *supra*.)

campaign funds.[52] Invalidating Section 9012(f) would defeat the Congressional purpose by allowing millions of dollars in privately raised contributions to swamp the public grant.

In the few months between the nominations and the election, and despite the proscription of Section 9012(f), appellees and two similar committees accumulated over $13 million. *See* p. 7 *supra*. If Section 9012(f) were invalidated, that would be only the beginning. These five committees collected over $21.5 million during the two years preceding the 1980 election,[53] and they would raise much more than that between now and the 1984 election if Section 9012(f) is struck down. Moreover, additional political committees similar to appellees would also be formed; like appellees, they would serve as vehicles through which professional political managers and fundraisers provide million-dollar supplements to their candidates' public subvention.[54] Corporate, labor,

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[52] *See, e.g.*, 117 Cong. Rec. 41780 (1971) (statement of Senator Hart that the public fund is not intended to be a "base for ever-increasing campaign spending"). *See also Buckley*, 424 U.S. at 99; *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. at 282.

[53] According to the data compiled by the Commission and lodged with the Court, the five committees had the following receipts during 1979-1980:

AFC	$ 1,072,549
AEP	1,920,377
FCM	3,093,544
NCCC	7,873,974
NCPAC	7,600,637
Total	$21,561,081

The relatively smaller collections of AFC and AEP reflect the fact that those committees were not even in existence until the last six months of 1980.

[54] At least two committees are apparently already being formed to support Democratic candidates; each seeks to raise $1,000,000 in its first year alone. *See The Wall Street Journal*, Feb. 3, 1981, at 22 col. 3; *The Washington Post*, Feb. 11, 1981, at C1, col. 1

and trade association political action committees would also follow suit. Given the rapid growth, enormous total wealth, and propensity to spend of such committees,[55] the sums that would be injected into efforts to influence the outcome of future Presidential elections would unquestionably eclipse the public grant; they could easily approach $100 million.[56]

The invalidation of Section 9012(f) would thus completely undercut the basic function of the Fund Act and revive the evils the Fund Act was intended to eliminate. Political committees representing private interests of all kinds would once again be free to leave "sort of a calling card, something that would get us in the door and make our point of view heard."[57] The campaign finance clock would be turned back to 1972, to the Nation's detriment.

C. Section 9012(f) Is Narrowly Tailored To Deal with the Most Serious Threats to the Independence and Integrity of Publicly Financed Presidential Candidates.

Section 9012(f) places no limit on expenditures by any individual of his own money to support Presidential

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& C8, col. 1; *id.*, Mar. 19, 1981, at D2, col. 2; *id.*, May 6, 1981, at 28; *Associated Press Washington Dateline*, Apr. 30, 1981 (AM Cycle).

[55] *See, e.g.*, H. ALEXANDER, FINANCING POLITICS 84-86 (2d ed. 1980).

[56] According to the data compiled by the Commission and lodged with the Court, 2751 non-party-related political committees had aggregate receipts of over $140 million and made aggregate disbursements of over $133 million during 1979-1980. If such committees were freed to raise and spend money for publicly funded Presidential campaigns, their collections would rise—probably appreciably—and a large portion of their money would be diverted to efforts to influence the Presidential election.

[57] *Hearings Before the Senate Select Comm. on Presidential Campaign Activities*, 93d Cong., 1st Sess. 5442 (1973) (testimony of Orin Atkins, Chairman of Ashland Oil Company).

candidates. Section 9012(f) applies only to "political committees," and the definition of that term does not include individuals. *See* 26 U.S.C. § 9002(9).[58]

Similarly, Section 9012(f) imposes no restriction on the freedom of two or more individuals, pooling and using their own money, to engage jointly in personal expression to support their preferred candidate. Section 9012(f) does not reach groups of individuals that do not constitute "political committees" within the meaning of the Fund Act.[59] The legislative history confirms that Congress did not intend to restrict the activities of groups of individuals who engage jointly in personal expression paid for out of their own pockets.[60]

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[58] The Conference Committee specifically rejected a Senate provision that would have subjected individuals to Section 9012(f). H.R. Rep. No. 92-708, 92d Cong., 1st Sess. 58 (1971).

[59] The statutory language makes clear that not all groups are "political committees." The Fund Act defines a "political committee" to include only a "committee, association, or organization (whether or not incorporated) . . . ." 26 U.S.C. § 9002(9). By contrast, the Federal Election Campaign Act ("FECA") defines a "political committee" as including "any committee, *club*, association *or other group of persons* . . . ." 2 U.S.C. § 431(4)(A) (Supp. III 1979) (emphasis added). Similarly, the Presidential Primary Matching Payment Account Act defines a "political committee" as including "any *individual*, committee, association, or organization (whether or not incorporated) . . . ." 26 U.S.C. § 9032(8) (emphasis added). These significant differences in the statutory language confirm that not all groups fall within the narrower Fund Act definition of "political committee." *Cf. Board of Governors* v. *Agnew*, 329 U.S. 441, 448 (1947) ("[t]he inference seems reasonable . . . that Congress by the words it chose marked a distinction which we should not obliterate . . . .").

[60] Senator Taft had proposed to amend Section 9012(f) by deleting the term "political committee" and substituting the much broader clause "any corporation, labor organization, partnership, association, political committee, political education committee, or any other committee." 117 Cong. Rec. 42397 (1971). Senator Pastore opposed this broad language because, in his view, it would

Section 9012(f) is thus specifically tailored to eliminate the most serious threats to the independence and integrity of publicly financed Presidential candidates. The Section applies only to entities—"political committees"—that collect contributions from persons who do not participate in or control the entities' activities but merely respond to requests for money. Such committees constitute uniquely potent vehicles for acquiring improper political influence, not only because their aggressive mechanized fundraising techniques permit the committees' managers to amass huge political funds, but also because control over the funds resides in a handful of fundraiser-managers who thus enjoy enormous leverage. *See* pp. 8-9, 27-29 *supra*. A publicly financed Presidential candidate, limited in his campaign spending to the amount of the public grant, could easily become obligated (or appear to be obligated) to such benefactors for their assistance to his election effort. Moreover, political committees pose a particularly grave threat to the proper and effective functioning of the public financing scheme because of the ease with which they can be used to evade the Fund Act's prohibition against contributions to, and its limit on expenditures by, a publicly financed candidate's campaign. *See* pp. 30-32 *supra*.

Because of the vast amount of money they can raise and control to benefit a candidate, political committees pose a much greater threat to the independence and

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have brought personal expression within the prohibition of Section 9012(f). *Id.* at 42399 (". . . I do not want to begin to straitjacket organizations that have a legal right, because of the character of their constitution, to proceed to express their *personal* opinion . . ." (emphasis added)). Senator Pastore clearly believed that groups of individuals should be free to pool and spend their own money for their own personal expression. *See id.* at 42398 ("a group on a campus, say faculty members"), 42401 (same), 42626 (a group of people who want to get together, pool their own money, and hire a hall to hold a mass meeting). Senator Pastore's view prevailed, and the Taft amendment was defeated. *Id.* at 42402.

integrity of publicly funded candidates than do individuals, whether acting singly or jointly. There are, to be sure, some very wealthy individuals who may use their wealth to make large personal expenditures to support a publicly funded candidate. But such expenditures pale beside the sums that political committees can and will pump into shadow campaigns for publicly financed candidates if Section 9012(f) is struck down. *See* pp. 7-8, 33-34 *supra*.[61] This fact reflects what Congress has long known and this Court has long acknowledged—that aggregated financial power poses the greatest threat to our democratic processes. *See* pp. 21-23 *supra*. Section 9012(f) is precisely tailored to meet that threat.[62]

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[61] The presently available data from the 1980 election confirm that personal expenditures by individuals pose a much smaller threat of influence-buying than do expenditures by political committees. Although independent expenditures by individuals were plainly unrestricted by law, only four individuals made independent expenditures in excess of $5,000 to advocate the election or defeat of Mr. Carter or Mr. Reagan, and the total sums spent by all individuals were smaller by far than the sums spent by appellees. *See* Federal Election Commission, *1979-1980 Candidate Index of Supporting Documents—(E)* (Apr. 6, 1981) (computer printout). The data from the 1976 election also leads to the same conclusion. *See* Federal Election Commission, *FEC Disclosure Series No. 3, Index of Independent Expenditures By Individuals and Receipts and Expenditures by Unauthorized Delegates, 1976 Campaign*, March 1977.

[62] This conclusion is, of course, not affected by the possibility that some political committees might conduct their fundraising and campaigns in such a manner that the dangers would not materialize. It is enough that Congress reasonably found that political committees generally pose a potential for serious harm and enacted a statute designed to deal particularly with it. Congress did the same thing when it placed limits on all political contributions even though some large contributions might not actually give rise to corruption, and this Court upheld Congress' action. *See Buckley*, 424 U.S. at 23-29. Section 9012(f) is therefore not overinclusive.

Similarly, Section 9012(f) is not underinclusive by virtue of applying only when a candidate accepts public financing. To be

D. Section 9012(f) Leaves Ample Room for the Exercise of Speech and Associational Freedoms.

Section 9012(f) does not significantly interfere with the exercise of First Amendment freedoms. It leaves individuals (and groups of individuals acting jointly) free to make unlimited independent expenditures of their own money for their own political expression in Presidenti campaigns.[63] *See* pp. 34-35 *supra*. It thus puts no ceiling on the aggregate amount of money that can be spent for expression in support of a candidate.[64] All Section 9012(f) does, at bottom, is require that persons (and groups of persons) who wish to engage in independent political advocacy in support of a publicly funded candidate do it themselves, using their own money for their own personal expression, rather than pay for the speech of others (or get others to pay for their speech) through contributions that involve only "marginal" First Amendment interests. *Buckley*, 424 U.S. at 20.

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sure, the activities of committees such as appellees may pose a similar threat to the integrity and independence of candidates who choose not to accept public financing. But the objective of the Fund Act was to provide a sufficiently generous public grant so that candidates would choose public financing and forswear private fundraising. The Fund Act has successfully accomplished that objective: Every major Presidential candidate since the Fund Act took effect has chosen public financing in the general election. Thus Section 9012(f) is, as a practical matter, as broad as it needs to be to accomplish its purposes. And, in any event, the fact that Congress might have made Section 9012(f) more broadly applicable provides no basis for striking it down. *See, e.g., Buckley*, 424 U.S. at 105 (citing prior cases for the proposition that Congress may undertake reform "one step at a time, addressing itself to the phase of the problem which seems most acute").

[63] By contrast, the across-the-board restriction on independent expenditures that the Court overturned in *Buckley* barred essentially *all* expenditures by *all* individuals, as well as by *all* groups, in *all* Federal elections. *See* 424 U.S. at 39-40 & n.45.

[64] By contrast, the expenditure restrictions overturned in *Buckley* drastically limited the overall amount of political debate. *See id.* at 39, 55.

Section 9012(f) leaves open to everyone broad avenues for the exercise of speech and associational freedoms in connection with Presidential elections. For example, anyone may contribute his time and energy to work for any candidate, political party, committee, group or other entity. *See* 2 U.S.C. § 431(8)(B)(i). Such participation encompasses a wide variety of traditional "grass-roots" activities, including helping to devise local campaign strategy, staging rallies, distributing leaflets and other campaign materials, making door-to-door or telephone appeals, and driving voters to the polls on election day.[65] Accordingly, Section 9012(f), like the contri-

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[65] Political parties and Congress alike have repeatedly acknowledged that such "grass-roots" activities by individuals are—even in this electronic age—important and valuable avenues of political participation. For example, in connection with the 1980 general election campaign the Republican National Committee undertook a nationwide program (called "Commitment '80") "to mobilize thousands of Reagan volunteers to conduct door-to-door distribution of campaign literature, to identify Reagan supporters, and to ensure that those identified supporters get to the polls on election day." FEC Statement, *supra* note 12, ¶ 63. The importance of such activities is further highlighted by the Joint Findings of Fact in the *Republican National Committee* case, which discussed the concern of the major national parties over the need to curtail grass-roots activities in order to keep within the Fund Act's spending limits in the 1976 general election campaign. *See* 487 F. Supp. at 293-98. Congress responded to this concern by enacting the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339, which permit State and local party committees to make unlimited expenditures to support grassroots activities. Congress thereby emphasized again the importance of such avenues for individual participation in the election process. *See, e.g.*, S. Rep. No. 96-319, 96th Cong., 1st Sess. at 1, 2, 4, 9 (1979); H.R. Rep. No. 96-422, 96th Cong., 1st Sess. at 2, 9 (1979).

Such personal political participation therefore cannot be dismissed as ineffective or meaningless. To do so would imply a cynical and unsupportable view of our participatory democracy, for these activities "sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *United States* v. *Automobile Workers*, 352 U.S. at 575, *quoted in Bellotti*, 435 U.S. at 788-89.

bution limits upheld in *Buckley*, leaves every person completely "free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates." 424 U.S. at 22.

Moreover, everyone can find numerous other ways to support publicly financed candidates consistently with Section 9012(f). For example, individuals (acting either singly or jointly) can purchase advertisements in local newspapers;[66] they can purchase local billboard space; they can prepare, reproduce and distribute handbills to their fellow citizens; and they can call in to radio "talk shows" or speak out in other forums to advocate the election of their favored candidate.

Individuals can also participate in more broadly based efforts. Section 9012(f) leaves all persons free to help a publicly financed candidate by contributing money to his party's national committee, which may in turn spend up to a specified limit (approximately $4.7 million in 1980) to promote the party's national ticket. *See* 2 U.S.C. §§ 441a(a)(1)(B), 441a(d)(2).[67] Every individual can also help a publicly financed candidate by contributing money to his party's state and local communities, which may in turn use as much of their money as they wish to support the candidate through campaign materials and get-out-the-vote activities. *See* 2 U.S.C. § 431(9)(B)(viii), (ix) (Supp. III 1979). And Section 9012(f) also allows everyone to support large-scale media discussions of particular issues by contributing money to purely issue-oriented, non-partisan organizations that buy radio,

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[66] They can, of course, also purchase advertisements in more expensive, nationally circulated newspapers, since the Fund Act imposes no ceiling on independent expenditures by individuals. Some persons have in fact purchased such advertisements. *See, e.g., The New York Times*, Oct. 30, 1980, at B8, cols. 1-3.

[67] The limit is equal to two cents times the national voting age population, adjusted for changes in the Consumer Price Index. *See* 2 U.S.C. §§ 441a(c), (d)(2).

television and newspaper space to advocate their positions.[68] The district court therefore clearly erred in asserting that Section 9012(f) prevents "individuals of modest means" from "join[ing] with others to state their views to the public with some force." C.C. App. 22a.

Section 9012(f) thus does not impose any significant restriction on the exercise of First Amendment freedoms. It does not restrict anyone's own speech. It allows full participation in traditional campaign activities and permits contributions to a publicly financed candidate's political party. The only associational interests the Section affects are the "marginal" interests inherent in making contributions to unaffiliated political committees. 424 U.S. at 20. Under *Buckley*, Congress may constitutionally limit those interests in order to protect the integrity of elected Federal officeholders and preserve public confidence in government. *Id.* at 29. Even "broad restrictions on . . . associational freedoms" can constitutionally be imposed for that purpose where—as here—everyone remains free to "[e]xpress his opinion as an individual privately and publicly on political subjects and candidates." *Buckley*, *id.* at 48 n.54 (discussing and quoting *Civil Service Commission* v. *Letter Carriers*, 413 U.S. at 579).

II. THE DISTRICT COURT ERRED IN HOLDING SECTION 9012(f) UNCONSTITUTIONAL WITHOUT ALLOWING THE DEVELOPMENT OF A FACTUAL RECORD.

Preserving the integrity of the Presidency and public confidence in it are compelling governmental interests that justify narrowly tailored restrictions on some speech and associational activities. Congress concluded—based

[68] Section 9012(f) does not reach "groups engaged purely in issue discussion," since only "organizations that are under the control of a candidate *or the major purpose of which is the nomination or election of a candidate*" constitute "political committees." *Buckley*, 424 U.S. at 79 (emphasis added).

on its own special insight into political realities, as well as on matters of common knowledge—that Section 9012(f) would contribute to the achievement of these important public interests. These congressional judgments are entitled to great weight, particularly since they involve matters in which Congress has special expertise.[69] If, however, this Court is reluctant to give effect to Congress' conclusions and is not satisfied on the present record of this case that Section 9012(f) serves compelling governmental interests, then the appropriate course is to remand the case for a trial in order to give appellants the opportunity to demonstrate, through evidence and testimony, that Congress was correct.

Appellants sought discovery bearing directly on the constitutionality of Section 9012(f). That discovery would have illuminated several important factual questions, including

> —whether, as Congress knew first-hand to be the case, the activities of "political committees" are controlled by their organizers and managers, rather than by their contributors;
>
> —whether, as Congress concluded, large expenditures by unaffiliated political committees to further the election of a candidate barred from using private contributions pose a danger of creating (or appearing to create) political debts owed to the managers of the committees; and
>
> —whether, as Congress apparently also concluded, ample and meaningful opportunities for the exercise of speech and associational freedoms are left open by a statute that limits expenditures by political committees but does not limit expenditures for personal advocacy and discussion.

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[69] *See, e.g., Fullilove* v. *Klutznick*, 100 S. Ct. 2758, 2771-72, 2775 (1980); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102-03 (1973); *Katzenbach* v. *Morgan*, 384 U.S. 641, 655-56 (1966); *Burroughs* v. *United States*, 290 U.S. at 547.

The district court disallowed all of appellants' discovery. It addressed these questions on the bare pleadings and resolved them on the basis of its own political intuition.[70] Not surprisingly, the district court reached a demonstrably erroneous conclusion on each point:

(1) The district court stated that the contributors "have power over the speech disseminated by the political committees," C.C. App. 16a, but the record—such as it was—showed just the opposite. *See* pp. 8-9 *supra*.

(2) The district court perceived no threat of actual or apparent political *quid pro quo*'s through independent expenditures by political committees, App. 19a, but experts on campaign finance practices say the threat is there. *See* pp. 27-29 *supra*.

(3) The district court apparently believed that candidates could become beholden at most only to the committees' contributors (the "small voices") and not to the committees' organizers or managers, C.C. App. 19a-20a, but campaign finance experts say the opposite is true. *See* pp. 27, 29 *supra*.

(4) The district court believed that Section 9012(f) hampers "the speech of individual contributors," C.C. App. 15a, but the Section does not limit personal expression, and it in fact leaves open wide avenues for political advocacy and participation. *See* pp. 38-41 *supra*.

The district court was wrong in disallowing discovery and cutting off all factual development. Section 9012(f)

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[70] The district court should, of course, have resolved all factual uncertainties in favor of appellants, since the case was before the court on motions by appellees to dismiss and for summary judgment. The court turned this well-established principle on its head by drawing all factual inferences, and resolving all factual uncertainties, in favor of the parties seeking dismissal. This error warrants a remand. *See, e.g., Conley* v. *Gibson*, 355 U.S. 41 (1957); *United States* v. *Diebold, Inc.* 369 U.S. 654 (1962) (*per curiam*).

should not have been invalidated in the absence of "the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." *United States* v. *Automobile Workers*, 352 U.S. at 591; *see also Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111, 113 (1962) (*per curiam*) (referring to the need for an "adequate and full-bodied record"), *quoted in H.L.* v. *Matheson*, 101 S. Ct. 1164, 1173 n.25 (1981). Instead of developing a full and concrete factual record about the nature, operations and dangers of political committees and applying the First Amendment "compelling interest" standard to that record, the district court in effect held that Section 9012(f) was *per se* unconstitutional simply because it regulates "independent expenditures." But there is no such rule of *per se* unconstitutionality, *see* pp. 15-23 *supra*, and the district court's short-cut was improper.

Section 9012(f) may not be held unconstitutional in the absence of a factual record, and "[t]he application of [the constitutional standard] to the evidence in the record is, in the first instance, a task for the District Court." *Mandel* v. *Bradley*, 432 U.S. 173, 179 (1977) (*per curiam*) (vacating the judgment and remanding where the three-judge district court had erroneously applied a *per se* rule of unconstitutionality instead of "sift[ing] through the conflicting evidence and mak[ing] findings of fact . . . ," *id.* at 178). Thus, if this Court is unwilling to uphold Section 9012(f) on the present record, it should vacate the decision below and remand the case to the district court with directions to develop a factual record and to apply the correct constitutional standard to it.[71]

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[71] This Court has consistently vacated and remanded where necessary to develop a factual record for constitutional adjudication. *See, e.g., Storer* v. *Brown*, 415 U.S. 724, 738-40 (1974) (three-judge district court decision vacated and remanded because in order to "assess realistically whether the [election] law imposes excessively burdensome requirements . . . it is necessary to know

CONCLUSION

For the reasons stated above, the Court should reverse the judgment of the district court. If, however, the Court should find that the record is insufficient to support reversal of the judgment, it should vacate the decision below and remand the case for factual development concerning (1) the nature and organization of political committees such as appellees, (2) their operations, (3) the relationship between the committees' managers and the contributors, (4) the dangers of actual or apparent political *quid pro quo*'s that such committees pose, and (5) the extent to which limits on such committees' expenditures leave open opportunities for political expression and participation by individual citizens.

Respectfully submitted,

MICHAEL L. BURACK
Counsel of Record
ROGER M. WITTEN
BRUCE E. COOLIDGE
CLIFFORD B. HENDLER

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Attorneys for Appellants
Common Cause, David Cohen
and Winifred Long

Of Counsel:

ARCHIBALD COX
KENNETH J. GUIDO, JR.
ELLEN G. BLOCK
DONALD J. SIMON

COMMON CAUSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1200

May 9, 1981

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other critical facts which do not appear from the evidentiary record"); *Polk Co.* v. *Glover*, 305 U.S. 5, 10 (1938) *(per curiam)* (reversing and remanding decision of three-judge district court); *Borden's Co.* v. *Baldwin*, 293 U.S. 194, 208-13 (1934) (same). *See also Gilmore* v. *Montgomery*, 417 U.S. 556, 570-74 (1974); *Askew* v. *Hargrave*, 401 U.S. 476, 478-79 (1971) *(per curiam)* (pleadings and affidavit "inadequate as a basis for deciding" constitutional claim which "should not be decided without fully developing the factual record at a hearing").

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Nos. 80-847 and 80-1067
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-847

COMMON CAUSE, *et al.*, *Appellants,*

v.

HARRISON SCHMITT, *et al.*, *Appellees.*

No. 80-1067

FEDERAL ELECTION COMMISSION, *Appellant,*

v.

AMERICANS FOR CHANGE, *et al.*, *Appellees.*

On Appeal from the United States District Court for the District of Columbia

BRIEF OF APPELLEE AMERICANS FOR AN EFFECTIVE PRESIDENCY

RALPH K. WINTER
323 Sterling Law Building
127 Wall Street
New Haven, Conn. 06520
(203) 436-4681

RODERICK M. HILLS
ROBERT K. BURGESS *
ROBERT B. SHANKS
EDWARD SONNENSCHEIN, JR.
LATHAM, WATKINS & HILLS
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 828-4400

Attorneys for Appellee
AMERICANS FOR AN
EFFECTIVE PRESIDENCY

* *Counsel of Record*

July 8, 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

Section 9012(f) of the Presidential Election Campaign Fund Act places a $1,000 limit on expenditures by political committees, other than a candidate's authorized committees, which further the election of the presidential candidate. A three-judge district court, sitting in the District of Columbia, declared section 9012(f) unconstitutional based on this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), holding, among other things, that a similar provision of the Federal Election Campaign Act unconstitutionally infringed upon the freedoms of speech and association.*

The questions presented in this case are:

1. Whether section 9012(f) was intended to reach independent expenditures by groups not affiliated with, or authorized by, a candidate's official campaign organization.

2. Whether under this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), section 9012(f) of the Presidential Election Campaign Fund Act violates the First Amendment guarantees of freedom of speech and association and the equal protection component of the Fifth Amendment.

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* In addition to the parties named in the caption, the other parties to the proceeding below were Americans for an Effective Presidency, on whose behalf this Brief is submitted, David Cohen, Winifred Long, Carl T. Curtis, and Fund for a Conservative Majority.

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Supreme Court of the United States

OCTOBER TERM, 1980

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v.

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No. 80-1067

FEDERAL ELECTION COMMISSION, *Appellant,*

v.

AMERICANS FOR CHANGE, *et al.*, *Appellees.*

On Appeal from the United States District Court for the District of Columbia

BRIEF OF APPELLEE AMERICANS FOR AN EFFECTIVE PRESIDENCY

These consolidated cases appeal a decision of a three-judge United States District Court sitting in the District of Columbia, which held 26 U.S.C. §9012(f) unconstitutional under the First Amendment. The District Court's opinion and order are not yet published but are reproduced as Appendix A to the Jurisdictional Statement filed by appellant Common Cause in No. 80-847.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly. . . .

26 U.S.C. §9012(f) provides:

(f) Unauthorized expenditures and contributions.

(1) Except as provided in paragraph (2), it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

(2) This subsection shall not apply to —

(A) expenditures by a broadcaster regulated by the Federal Communications Commission, or by a periodical publication, in reporting the news or in taking editorial positions, or

(B) expenditures by any organization described in section 501(c) of this title which is exempt from tax under section 501(a) in communicating to its members the views of that organization.

(3) Any political committee which violates paragraph (1) shall be fined not more than $5,000, and any officer or member of such committee who knowingly and willfully consents to such violation and any other individual who knowingly and willfully violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than one year, or both.

STATEMENT OF THE CASE

A. The Statutory Framework.

Presidential election campaigns are regulated by the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§431-55 (1976 & Supp. III 1979), and the Presidential Election Campaign Fund Act ("Fund Act"), 26 U.S.C. §§9001-9013 (1976 & Supp. III).[1] Both statutes were originally enacted in 1971

[1] Except as otherwise noted, all citations to FECA and the Fund Act are to the current versions, as amended, Titles 2 and 26 of the United States Code, respectively.

and substantially amended in 1974, when Congress added contribution and expenditure limitations to FECA, added automatic appropriations to the federal election fund, and established the amount of the candidates' entitlement.

Through FECA, as amended, Congress placed limits on the amount of money individuals and groups could contribute to candidates for federal elections and to political committees, and ceilings on the total expenditures permitted in support of such candidates from any source — the candidates themselves, their official organizations, and other supporters not part of the official campaigns. Specifically, FECA limited expenditures independent of a candidate's campaign to $1,000. This limit applied to all federal campaigns, including presidential and vice-presidential campaigns.

The Fund Act was enacted as subtitle H of the Internal Revenue Code and provided for public funding of general presidential and vice-presidential election campaigns through the Presidential Election Campaign Fund, financed through a voluntary taxpayer check-off system. Major party candidates who satisfy the Act's eligibility requirements[2] can elect to receive payments from the Fund to defray campaign expenses incurred by the candidates or their authorized committees.[3] 26 U.S.C. §§9012(c); 9002(11) (qualified campaign expenses).

In order to receive public financing under the Fund Act, candidates must agree that they, and their authorized committees, will be bound by other restrictions on contributions and on the amounts of qualified campaign expenses they incur, 26 U.S.C. §§9002(4) and 9003, including the requirements that they not incur aggregate expenses in excess of the amount of public funding and not accept private contributions to defray their campaign expenses. 26 U.S.C. §9003(b). The effect of the candidate's agreement to abide by statutory limits on cam-

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[2] These requirements are set forth in 26 U.S.C. §9003.

[3] The term "authorized committee" is defined by the Fund Act to mean any political committee authorized in writing by a candidate. 26 U.S.C. §9002(1).

paign expenditures and by the prohibition on receiving private contributions is to forbid all expenditures by individuals and groups in coordination with the candidate's campaign. This result is brought about by the definition of "contribution," which includes all coordinated expenditures. 2 U.S.C. §441a(a)(7)(B).

Section 9012(f) of the Fund Act, the section at issue here, prohibits any political committee,[4] other than an authorized committee, from incurring any expenditures in excess of $1,000 "to further the election" of a candidate who has qualified to receive funds. Given the Act's broad definition of political committee, the effect of a literal reading of section 9012(f) is to prohibit any unauthorized group or political committee[5] from making independent expenditures[6] in excess of $1,000, if that expenditure will "further the election" of a candidate who has elected to receive public funding under the Fund Act.

Section 9012(f) does not apply to broadcasters or periodical publications reporting news or taking editorial positions, 26 U.S.C. §9012(f)(2)(A), or to expenditures by tax exempt organizations under section 501(c) of the Internal Revenue

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[4] The Fund Act defines the term "political committee" to mean "any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office." 26 U.S.C. §9002(9).

[5] The Federal Election Commission ("FEC") has defined an "unauthorized committee" as "a political commitee which has not been authorized in writing by a candidate to solicit or receive contributions or make expenditures on behalf of such candidate. . . ." 11 C.F.R. §100.5(f)(2) (1980). Thus all political committees are either "authorized," *see* note 3, *supra,* or "unauthorized."

[6] The term "independent expenditure" is defined at 2 U.S.C. §431(17), and by the FEC's regulations, 11 C.F.R. §109.1(a)(1980), as one " made without cooperation or consultation with [a] candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. §431(17).

Code "in communicating to its members the views of that organization." 26 U.S.C. §9012(f)(2)(B). Thus a wide variety of private organizations including, among others, labor and agricultural organizations, the chamber of commerce, fraternal organizations, and certain non-profit corporations, are exempt from section 9012(f)'s $1,000 limitation applicable to other groups.

The FEC has exclusive jurisdiction to enforce the Fund Act. 2 U.S.C. §437c(b)(1). Political committees which violate §9012(f) are subject to criminal penalties under 26 U.S.C. §9012(f)(3).

Section 9011(b) of the Fund Act authorizes the FEC, the national committee of any political party, and individuals eligible to vote for President, to institute actions where appropriate "to implement or construe" provisions of the Fund Act and establishes an expedited procedure by which such actions may be adjudicated by a three-judge court with a right of direct appeal to this Court. *Id.*

B. The Facts Giving Rise to These Cases.

Ronald Reagan, the 1980 Republican presidential candidate, opted for public financing under the Fund Act. The Reagan campaign and its authorized political committees[7] (other than the Republican National Committee) were therefore prohibited from accepting private contributions or from spending more than the amount of the public grant.[8]

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[7] As used in this brief, the terms "Reagan campaign" and "the official Reagan campaign" refer to Ronald Reagan, his authorized committees and their agents. Mr. Reagan's authorized committees included the Reagan for President Committee, the Reagan for President General Election Committee, the Reagan for President Compliance Fund, and the 1980 Rupublican Presidential Unity Committee. Statement of Candidacy of Ronald Reagan, filed with FEC and dated June 26, 1980. The Republican National Committee was also an authorized committee and agent of the Reagan campaign.

[8] National party committees affiliated with a candidate are permitted to spend an amount equal to two cents times the voting age population of the United States. 2 U.S.C. §441a(d)(2).

Appellees Americans for an Effective Presidency ("AEP"), Americans for Change ("AFC"), and Fund for a Conservative Majority ("FCM") are political committees within the meaning of the Fund Act. Each sought to mount a fundraising and advertising campaign in support of Ronald Reagan for President and of various other candidates for public office. None of the appellees is an "authorized committee" of Ronald Reagan, and all operated independently of the Reagan campaign.[9]

All relevant facts before the district court were undisputed. Appellees solicited contributions from individuals who favored Ronald Reagan for President.[10] Appellees' literature and solicitation materials detailed their support for Ronald Reagan and other candidates and outlined their intention to spend the sums collected to publicize their support for such candidates. The money raised was used to engage professional media and political consultants, to purchase advertisements, and generally to publicize their political views before the November election.

C. The Proceedings Below.

On July 1, 1980, Common Cause filed a Complaint against AFC and its Chairman and Treasurer. Count I of the Complaint alleged that AFC's political activities, even though independent and not associated with the Reagan campaign, violated 26 U.S.C. §9012(f)'s $1,000 ceiling on independent

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[9] The FEC has never alleged that appellees' activities were not independent of the Reagan campaign. Common Cause originally alleged in Count II of its Amended Complaint that appellees' activities were coordinated with the Reagan campaign, but this count was dismissed by the district court on jurisdictional grounds and for failure to state a claim for relief, as stated in parts V. A and V. B of the court's opinion. See FEC App. A to Jurisdictional Statement at 28a-32a. Common Cause has not appealed from this dismissal. Common Cause Jurisdictional Statement at 6, n.7. Thus, for the purposes of this appeal, all parties assume *arguendo* that the expenditures of AFC, AEP and FCM were made independently of the official Reagan campaign. *Id.*

[10] All contributions to appellee committees were subject to the $5,000 contribution limitation imposed by §441a of FECA.

expenditures by political committees. Count II of the Complaint alleged that AFC was in fact not independent of the official Reagan campaign and that AFC's receipts and expenditures were therefore contributions to, or expenditures by, the Reagan campaign, thereby violating the Fund Act's restrictions on contributions and expenditures. The Complaint sought declaratory and injunctive relief and requested that a three-judge court be convened and that the action be expedited pursuant to the procedure provided in 26 U.S.C. § 9011(b) for actions as may be appropriate "to implement or construe" the Fund Act. Common Cause also moved for immediate discovery against AFC.[11]

On July 15, 1980, the FEC filed an action against AFC, AEP and FCM contending that appellees' independent political activities violated section 9012(f)'s restriction on expenditures by political committees in excess of $1,000 and seeking declaratory relief, including a declaration that section 9012(f) was constitutional.

Shortly thereafter, on July 17, 1980, Common Cause amended its Complaint to add appellees AEP and FCM as defendants. Common Cause then moved to consolidate the two actions and to intervene as a plaintiff in the FEC's action.

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[11] Common Cause argues strenuously that the district court erred in holding section 9012(f) unconstitutional without permitting discovery against appelless, Common Cause Breif at 41-44, despite the fact that Common Cause took the position below that it required discovery primarily in order to support the allegations in Count II of its Complaint, that appellees were not in fact independent of the Reagan campaign. *See Common Cause* v. *Schmitt*, Transcript of Hearings (August 6, 1980) at 54. Yet Common Cause has not appealed from the district court's dismissal of Count II. *See* note 9, *supra*. Inasmuch as Common Cause and the FEC do not contest appellees' independence from the Reagan campaign, and appellees do not contest the fact that they are "political committees," factual discovery pertaining to these particular committees will serve no useful purpose.

Appellees moved for dismissal or, in the alternative, for summary judgment in both actions on the ground, among others, that the restrictions imposed by section 9012(f) on independent expenditures by political committees are unconstitutional under this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). The appellees and the FEC also sought to dismiss Common Cause's action on the ground that Common Cause lacked standing to bring an action to enforce the Fund Act, and that the three-judge court was without jurisdiction to hear its claim.[12]

The three-judge district court was convened on July 17, 1980 pursuant to appellants' request for expedited treatment under section 9011(b). The court stayed all discovery and set briefing and argument schedules on appellees' motions for dismissal and summary judgment and on the jurisdictional issue. On August 28, 1980, the court issued orders granting appellees' motions for summary judgment in the FEC's action and dismissing Count I of Common Cause's action on the basis of the court's disposition of the Commission's case. Count II of Common Cause's action was dismissed for lack of jurisdiction and failure to state a claim. FEC Jurisdictional Statement App. B. Common Cause has not appealed from the district court's dismissal of this count.

On September 25, 1980, the district court issued an order consolidating the two cases. FEC Jurisdictional Statement App. C. On September 30, 1980, the court issued its opinion, authored by Judge Wilkey. FEC Jurisdictional Statement App. A.

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[12] Appellees argued that the FEC has exclusive jurisdiction over the civil enforcement of the election laws, including the Fund Act. 2 U.S.C. §437c(b)(1). Common Cause's Amended Complaint sought a declaration that appellees had acted, or would act, in violation of section 9012(f) and asserted that the three-judge court had jurisdiction over this action under section 9011(b). But the language of this section does not alter the FEC's exclusive enforcement responsibility or grant Common Cause a private right of action to enforce section 9012(f), a criminal statute, against another private party. *See generally*, Brief for Intervenor-Appellee Federal Election Commission.

D. The Opinion of the Three-Judge Court.

The three-judge district court based its analysis of section 9012(f) squarely on this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

Utilizing the *Buckley* analysis, the district court carefully weighed the governmental interests allegedly served by section 9012(f)'s apparent $1,000 limit on independent expenditures by groups and the resultant impact on political speech and associational activity. It concluded that the proposed spending by appellee committees constituted independent expenditures constitutionally protected under *Buckley*. Because the district court held section 9012(f) facially unconstitutional, it had no need to rest its decision on any facts peculiar to these cases.

SUMMARY OF ARGUMENT

Section 9012(f) has an unusually explicit legislative history. On several occasions prior to passage of the Fund Act, the question of independent expenditures was raised. On each such occasion, the bill's sponsor, Senator Pastore, responded that independent expenditures were not limited by the terms of the provision that later became section 9012(f). The Federal Eiection Commission itself explicitly declined in 1977 to promulgate regulations under that provision which would have applied it to independent expenditures but limited its effect to state or local party committees. Until initiation of the present eve-of-election lawsuit, no one believed that section 9012(f) applied to independent expenditures.

Read literally and without regard to clearly expressed legislative intent, section 9012(f) is facially unconstitutional. It grossly intrudes on a vast area of mainstream political activity, including issue discussion, distribution of factual information such as voting records, and even scholarly research. Because it forbids almost all political advocacy which is not funded by national campaign committees or state or local parties, it conditions speech by groups upon the approval of party officials, in effect censoring the content of speech. By

restricting the activities of groups of persons who can participate meaningfully only in concert with others, section 9012(f) infringes on freedom of association.

Section 9012(f) leaves the wealthy free to make unlimited independent expenditures while silencing the less well-to-do. While section 9012(f) quite rightly exempts the institutional press from its terms, it unconstitutionally discriminates against groups like AEP seeking to publish their own messages, including republication of press editorials, while affording unjustifiable special privileges to labor unions, the chamber of commerce, and other non-profit groups. Its pervasive language is so vague that it chills a wide range of perfectly legitimate activity.

ARGUMENT

I

Congress Never Intended Section 9012(f) To Limit Independent Expenditures.

Section 9012(f) was never intended by Congress to limit independent expenditures. To the contrary, its sponsor specifically and deliberately stated that such expenditures were exempt from its terms. Judicial decisions have fully supported this view, and subsequent regulations, as well as administrative rulings, of the FEC accepted that construction until this eve-of-election lawsuit was brought.

A. The History Of Section 9012(f)'s Passage Demonstrates A Congressional Intent To Exclude Independent Expenditures.

When section 9012(f) was passed, the public financing provisions were merely an alternative to private financing available without any limitations on contributions. Just prior to introduction of the bill that later became Chapter 26

(general election federal funding), the Senate had adopted a bill which became the 1971 FECA. This bill contained two provisions of crucial importance to this case.

The first was a limitation, section 104(a)(1) of Title I, on expenditures by candidates for federal office (including presidential candidates) for use of the communications media. Congress, hoping to prohibit independent expenditures for media activities which, when added to candidate expenditures, would exceed the limits, enacted a provision which forbade the media from charging anyone using their facilities on behalf of a candidate unless the candidate certified that the payment would not cause him or her to exceed the statutory limit. *Id.*, §104(b).[13] In effect, no expenditure could be accepted by a media facility in a presidential election campaign without the candidate's permission.

The second important provision of the 1971 FECA was a requirement for financial disclosure by "political committees" defined as "any committee, association or organization which accepts contributions or makes expenditures. . . ." Federal Election Campaign Act of 1971, §301(d). The words "or other group," which appear in the 1974 FECA, were not included. The term "expenditure" was defined to include payments "for the purpose of influencing . . . " a federal election. *Id.*, §301(f)(1).

The legislative history of these definitions is sparse. Indeed, the very next year, the United States Court of Appeals for the Second Circuit noted that the Senate Report might

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[13] Title I, §104(b) provided:

"No person may make any charge for the use by or on behalf of any legally qualified candidate for Federal elective office (or for nomination to such office) of any newspaper, magazine or outdoor advertising facility, unless such candidate (or a person specifically authorized by such candidate in writing to do so) certifies in writing to the person making such charge that the payment of such charge will not violate [the spending limitation]."

"be searched in vain for any passage which throws further light upon the meaning of 'political committee' or 'made for the purpose of influencing.' " *United States* v. *National Committee For Impeachment*, 469 F.2d 1135, 1139 (2d Cir. 1972).

In this statutory context, Senator Pastore introduced Chapter 26 as an amendment to a pending tax bill. "Political committee" was defined in terms essentially identical to the 1971 FECA, including omission of the words "or other group." A full Senate debate took place, and much confusion surrounded the meaning of "political committee." But one thing was made clear: that term was not intended to apply to independent expenditures.

Senator Taft sought to amend the provision that would become section 9012(f) by expanding the groups affected to include "[a]ny corporation, labor organization, partnership, association, political committee, political education committee, or any other committee." He made it clear that his amendment was designed to dispel any doubt about the inclusion of organizations such as COPE or AMPAC within its terms. 117 CONG. REC. S 19151-19152 (daily ed. November 19, 1971). Senator Pastore opposed this initiative, largely on the ground that independent expenditures should be exempt. The following colloquy took place:

> Mr. TAFT. I suggest if the amount put on as a limitation of expenditures, as an attempt to put an overall limit on expenditures in presidential campaigns is included, if this is to have meaning, it has to have that.
>
> Mr. PASTORE. There is a distinction. Usually a political committee is formed for the purpose of directly aiding that candidate and there is no question about being authorized by that candidate. We wrote something to that effect in the other bill. How far are we going to go without obligating independent organizations and committees furthering the promotion of a particular candidate on their own?
>
> I know what the Senator is trying to accomplish but I am wondering on this amendment whether or not we may

be opening Pandora's box. There is no question about what the Senator said.

Mr. Taft continued:

> Mr. TAFT. The Senator is aware of a good many cases of committees organized in a good many other areas in the labor area. We have heard a great deal of screaming about AMPAC and a number of other organizations of this kind that have been set up and continue to collect funds and make contributions for candidates. I think all these contributions should come in. I think they should all be under the limitation. If there is going to be a limitation, let there be a limitation and a limitation that is meaningful.
>
> I predict this amendment will be defeated on the same kind of party line as other amendments. I suspect that will be true. But I bring the amendment up today because this is a matter on which we are going to have to make a decision on this kind of an amendment, and I think this is the direction in which it will be considered. *Id.*, S 19152.

Later in the same debate, Senator Pastore said:

> Mr. PASTORE. Mr. President, I want to say to the Senator from Ohio that this is the most sensitive area in which we can legislate. This problem was in the other bill. The only problem is that the Senator from Ohio always keeps on hammering COPE, instead of hammering at the Chamber of Commerce.
>
> Mr. TAFT. Or an oil company.
>
> Mr. PASTORE. The Senator keeps hammering at COPE, COPE. The devil appears to be COPE. It appears to be COPE every time. It is a tough area in which to legislate. For example, anyone is entitled to think as he likes and to say what he thinks. He is not authorized by the candidate to do so. He gets together as a committee because they think it is to their advantage, whether school teachers, COPE, or some other group. And they issue an article that costs $1,500. The candidate does not know what it is about. He never heard of the article, much less read it. Under this law, this group would be subject to a $5,000 fine. It is hard for me to buy. It is close to the line. *Id.*, S 19155.

On the basis of this colloquy, it must be concluded that the sponsor of the amendment, Senator Pastore, had no intention of limiting independent expenditures, even when made by large, centrally directed groups able to amass large amounts of money.

Other debate clarified the matter even further. Senator Goldwater posed a hypothetical involving independent spending which Senator Pastore directly answered:

> Mr. GOLDWATER. . . . Suppose his brother buys some time on television and the candidate says, "I did not know my brother was spending money that way." There is no way we can prevent that.
>
> * * *
>
> Mr. PASTORE. That is covered by S.382. [1971 FECA] I keep repeating that. What we are trying to do is to characterize this particular bill as complementary legislation on campaign expenditures and campaign financing. This is the financing part. We have already passed the other bill and I am hopeful that the House will pass the same bill and it will become law. . . .
>
> On the proposition the Senator is talking about, we took care of that 3 months ago when we passed S.382. I would hope the House would pass it. I would admit that this bill does not cure that part. But we have already taken care of that. Hopefully, that bill will pass in the House and the President will sign it and the two together will give us a complete package. *Id.*, S 18938 (daily ed. November 18, 1971).

This is a clear statement by the sponsor that whatever limitations on independent expenditures Congress intended were included in the 1971 FECA, and "this bill does not cure that part."

The matter did not rest there, however. On yet another occasion, Senator Pastore was asked about independent expenditures and again, without challenge from any other Senator, he gave an unequivocal answer:

> Mr. MAGNUSON. I want to ask the Senator from Rhode Island a question that has been bothering me

throughout this debate. This may not be a loophole. Suppose a group of people wanted to get together and support Mr. A for President, and they are going to devote their time to go out and do what they can for him. They may hire a hall for a mass meeting. Would that be in violation?

Mr. PASTORE. Does the Senator mean if they acted on their own?

Mr. MAGNUSON. They would get together. I suppose it would be difficult to act on their own. Perhaps they would have a meeting place where they rent a hall, and they would spread out on election day to go to the polls to support Mr. A. There would be no money raised except their own expenses, which would amount to nothing, comparatively.

Mr. PASTORE. That raises a very sensitive area. We struggled with that on the campaign expenditures limitations. The Senator is talking about individuals who, absolutely independent of the candidate, on their own, made some effort?

Mr. MAGNUSON. Yes.

* * *

Mr. PASTORE. To answer the Senator, *we do nothing to impinge upon freedom of speech and freedeom of activity. So long as the candidate knows nothing about it and there is no subterfuge about it, the people are entitled to act as they will. Id.*, S 19302 (daily ed. November 22, 1971) (emphasis added).

It is thus absolutely clear that a "political committee" under section 9012(f) was not intended to include organizations or groups engaged in independent spending.

B. Subsequent Interpretations Of Section 9012(f) By The Courts, Congress, And The Federal Election Commission Further Support The Fact That It Excludes Independent Expenditures.

Subsequent judicial interpretations have reached similar conclusions. In both *American Civil Liberties Union* v. *Jenn-*

ings, 366 F. Supp. 1041 (D.D.C. 1973), and *National Committee For Impeachment, supra,* 469 F.2d 1135, three-judge courts in the District of Columbia and the Second Circuit concluded that the modifying words, "made for the purpose of influencing," used in the definitional sections of the 1971 FECA included only those expenditures which are authorized or controlled by the candidate. Since that very language was taken from the 1971 FECA and used in Chapter 26's definition of "political committee," 26 U.S.C. §9002(9) ("expenditures for the purpose of influencing"), no historical case can be made for extending section 9012(f) to independent expenditures.

Jennings struck down the certification procedure relating to media expenditures, and in 1974 Congress amended the FECA to provide a limit on all independent expenditures, 18 U.S.C. §608(e)(1). That provision read:

> (1) No person may make any expenditure (other than an expenditure made by or on behalf of a candidate within the meaning of subsection (c)(2) (B)) relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000.

Section 608(e)(1) was, of course, struck down in *Buckley, supra,* 424 U.S. at 39-51.

After the *Buckley* decision, Congress amended the FECA to conform to this Court's ruling. Its understanding clearly was that no limitation on independent spending was constitutionally permissible and that, after *Buckley,* none existed. Indeed, one cannot find in the legislative history following *Buckley* a single reference by any Senator or Congressman to indicate that the election laws contained another limitation on independent expenditures. In the context of the post-*Buckley* amendments, surely section 9012(f) would have been examined and discussed to ensure its constitutionality following the demise of section 608(e)(1) if it restricted independent expenditures.

As Senator Cannon characterized the decision on the floor on March 18, 1976,

> "an *organization* could spend all of the money it wanted of its own or spend in association with others for the defeat or for the election of a candidate." 122 CONG. REC. S 3800 (daily ed. March 18, 1976). (Emphasis added).

And Senator Buckley summarized Congress' view of the lawsuit he had brought when he stated:

> "[T]he practical consensus of that decision is that we are going to see more and more *well-organized, well-financed groups operating outside of an individual campaign, parallel to it, but independently." Id.* (Emphasis added).

Other senators expressed their understanding that under *Buckley,* union and corporate political action committees (PAC's) could make independent expenditures without limitation. *See* remarks of Senator Mondale, *Hearings on S. 2611 Before the Subcommittee on Privileges and Elections of the Committee on Rules and Administration* 87, 94th Cong., 2d Sess. (1976), and Senator Chiles, 122 CONG. REC. S 3802 (daily ed. March 18, 1976).

This understanding is most tellingly related by the statements of Senator Kennedy, a leading proponent of campaign regulation. He cited the "problems of independent spending," as well as spending by wealthy candidates, resulting from *Buckley* and proceeded to name the tools at hand for controlling these "problems." They were: disclosure of independent spending; the standards for independence from the official campaign organization; and the limitations on the expenditures of publicly funded candidates from their *personal* resources. He did not mention any provisions which would have limited *independent* expenditures because of the acceptance of public funding; indeed, he stated that "[i]f there is . . . cooperation, the expenditure is a contribution and will be subject to the spending limits." 122 CONG. REC. S 3801 (daily ed. March 18, 1976) (emphasis added).

Prior to the position taken in this eve-of-election lawsuit, the Commission itself did not view section 9012(f) as applicable to independent expenditures, whether made by individuals, groups, or any other political committees. In 1976, following the *Buckley* decision, the Commission expressly considered a proposed regulation with respect to section 9012(f) similar to the position it takes here, but declined to adopt it.[14] Instead the Commission adopted a regulation allowing state or local party committees to make expenditures up to $1,000 furthering all nominees on the ticket, including the presidential candidate. 11 C.F.R. §§110.7(a)(5), 110.7(b)(4), 146.1 (1980). Other than section 9012(f), there was no statutory authority permitting such expenditures. Congress did not disapprove these regulations after they were submitted to the legislative veto process under section 438(c).[15]

Clearly, if section 9012(f) limits independent expenditures, the promulgation of regulations in 1977 was the proper occasion for the Commission to elaborate appropriate definitions and substantive rules. It was also the proper occasion for appellant Common Cause to propose them. The failure of both appellants to act on that occasion merely underlines the lack of merit in the contentions they now press with such assurance.

Indeed, until this very lawsuit, the Commission has routinely acted as though section 9012(f) applied only to candidate controlled committees.

The Commission adopted regulations in 1977 which, among other things, authorize unlimited independent expenditures by any "person," defined to mean "individual, partnership, committee, association, or any organization or group of persons," with certain exceptions not here relevant. 11

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[14] *See* Hearings on Part 140 (General Election Financing) Before the Federal Election Commision (July 7, 1976).

[15] These regulations were dropped after the 1980 FECA amendments permitting local party spending of certain kinds. *See* 2 U.S.C. §431(8)(b)(x)(xii).

C.F.R. §§109.1(a) and (b)(1). More recently, in November 1979, the Commission specifically acknowledged in the *Republican National Committee* case that "[p]laintiffs are free to contribute money to political committees (other than the candidates' authorized committees) to make unlimited independent expenditures" in support of a publicly funded candidate for President in the general election. *Republican National Committee* v. *Federal Election Commission,* 616 F.2d 1 (2d Cir. 1980), *aff'd,* 445 U.S. 955 (1980) (FEC Brief at 48).

The Commission has issued public letters and opinions consistent with the position that section 9012(f) does not limit independent expenditures. For example, the Commission stated in connection with the 1976 general election that the "GOP Feminist Caucus" could expend funds with "no limitation" for the production of campaign buttons supporting President Ford in the general election if its "expenses for the buttons [came] within the definition of an independent expenditure. . . . Expenses incurred during the general election campaign period must qualify as independent expenditures since as a general rule contributions to Presidential candidates who receive funding are prohibited." Informational Letter re: AOR 1976-28, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6062.

Similarly, the Commission implicitly acknowledged the legitimacy of independent expenditures in support of then candidate Carter in the 1976 general election. In describing the form of disclaimer to be used on communications of the "Citizens for Carter" committee, "an independent political action committee," the Commission discussed expenditures for such communications but did not mention section 9012(f). AO 1976-35, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5206. Discussion of the proper disclaimer to be attached to communications is meaningless unless expenditures for the communications are lawful in the first instance. *See also* Informational Letter to Ralph H. Goettler, October 4, 1976 (referring to the requirement of independence in connection with "independent expenditures on behalf of President Ford" by "an individual or committee").

Last year, in AO 1979-80, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5469, a question was posed to the Commission concerning the possible use by an independent political committee of an advertising firm which had previously been engaged by a candidate for the nomination for President. The Commission responded that if the "candidate for nomination becomes the nominee, [the independent political committee] would presumably be precluded from engaging the advertising firm to make independent expenditures during the general election." The Commission did not address the propriety of independent expenditures during the general election, but rather addressed only the need for such expenditures to be independent.[16]

This history of section 9012(f) reveals not a trace of congressional intent to limit independent expenditures. Indeed, Senator Pastore repeatedly stated his desire to avoid legislation raising such a delicate constitutional issue. Despite section 9012(f)'s overly broad and vague terms, it was never intended to reach independent expenditures.

II

Applied Literally, Section 9012(f) Is Facially Unconstitutional.

A. Section 9012(f) Is A Gross Intrusion On Protected Speech.

1. The Language Of Section 9012(f) Covers A Vast Area Of Protected Speech.

The language of section 9012(f), if applied without regard to congressional intent, will affect a vast area of mainstream political activity.

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[16] Furthermore, the Commission did not indicate that independent expenditures would in any way be limited by virtue of the fact that the advisory opinion request clearly contemplated a professional media campaign.

"Any political committee" not authorized by a candidate is prohibited by the terms of section 9012(f) from making "expenditures" in excess of $1,000 "to further the election" of a candidate which would constitute "qualified campaign expenses" if made by that candidate. *Id.*

The statutory definition of "political committee" includes "any committee, association or organization (whether or not incorporated)," 26 U.S.C. §9002(9), terms sufficiently broad, if read apart from their legislative intent, to cover any grouping of persons making a concerted and organized effort to engage in political speech.

The nature of the expenditures subject to section 9012(f) is virtually unlimited, for it covers payment for anything which would be a "qualified campaign expense" if made by a candidate, which in turn is defined as any expense incurred "to further" the candidate's election. 26 U.S.C. §9002(11). The statute thus includes within its prohibitions every kind of expenditure which might be made by presidential campaigns, including an array of issue-oriented activities in addition to express advocacy of a candidate's election.

For example, research into a presidential candidate's stance on issues while holding earlier public office, the printing and circulation of voting records, the distribution of instructions on how to split a ticket, publication of a point of view on a potential issue, printing a newsletter describing a candidate's position on certain matters, support for a scholar writing a book examining the credentials of various candidates and concluding that one or the other is preferable, bringing or defending litigation involving ballot access or campaign finance in a presidential election, are just some of the kinds of activities for which expenditures by a campaign would be "qualified campaign expenses."

As a consequence, section 9012(f), read literally, impacts on issue discussion as well as explicit candidate advocacy. In the 1980 election, for example, Mr. Carter supported the SALT II agreement while Mr. Reagan opposed it. A group of

individuals sharing the cost — or raising money to share the cost — of a newspaper advertisement in late October extolling the virtues of SALT II would fall within section 9012(f)'s proscriptions. Political activists purchasing such an ad could hardly claim indifference to the outcome of the election or deny that the ad might "further" Mr. Carter's chances. The ad would surely be a "qualified campaign expense" if purchased directly by the Carter campaign.

During the fall of 1980, many law students and faculty were apprehensive about the effect of a Reagan victory upon legal services for the poor and appointments to this Court. A group which set up a table in the hall of the law school and solicited contributions to fund publicity and other activities in the particular locality highlighting these issues would have violated section 9012(f) if they raised and spent in excess of $1,000.

A scholar writing a book or pamphlet on the relative credentials of presidential candidates might easily run afoul of section 9012(f). Support for such work could not be safely given by any group of persons or organization perceived as favoring whichever candidate got the better of the comparison. In September 1960, for example, Professor Arthur Schlesinger, Jr. published *Kennedy or Nixon: Does It Make Any Difference?* Financial support for research, footnoting, typing, and other support exceeding $1,000 for such a work today would be possible only if undertaken by the author individually, or by an authorized committee of the candidate being supported.

In the recent election, groups opposing the candidacy of Congressman Anderson might reasonably fear that independent expenditures opposing his election would be viewed as "furthering" the election of Mr. Carter.

The present litigation itself may be a violation of section 9012(f). The Common Cause plaintiffs acknowledged at page 10 of their Complaint that they wanted to prevent people from being persuaded to vote for Mr. Reagan; consequently, this lawsuit was intended to "further" the Carter candidacy.

2. Section 9012(f), Read Literally, Regulates The Content Of Political Persuasion.

As the Common Cause appellants allege, the "injury" section 9012(f) is designed to prevent is the peaceful persuasion of American voters regarding their choice for President and Vice-President of the United States. Appellee AEP does not understand appellants to dispute seriously that the conduct they seek to prohibit is peaceful political advocacy, or that the reason they seek to prohibit it is that it might be found persuasive by United States citizens. Taking all of the appellants' claims about the harmful impact of independent expenditures at face value, they amount to nothing more than the fear that voters might be exposed to a wider variety of appeals by a wider variety of groups, and might be responsive to them. Such speech is at the very core of the First Amendment and is entitled to the maximum constitutional protection.

Section 9012(f) regulates content. If read literally and held constitutional, all politically significant campaign advocacy in presidential elections will have to be channeled through six routes:

(1) Activities funded by the national campaign committee subject to its discretion and the expenditure limits imposed by 2 U.S.C. §441a(b). As a consequence of *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), 616 F.2d 1 (2d. Cir.) (en banc) (*per curiam*), *aff'd summarily*, 445 U.S. 955 (1980), individuals or grass root organizations may not make expenditures in any amounts for activities which fall within the statutory definition of coordination, such as making a storefront available to campaign volunteers or even purchasing pads and pencils for campaign phone canvassing.

(2) Use of campaign materials purchased by a local party committee or voter registration and get-out-the-vote activities "conducted" by such committees. 2 U.S.C. §431(9)(B)(viii)(ix). These activities are also subject to the discretion of local officials and their access to funds.

(3) Partisan communications by a labor organization (including the AFL-CIO federation) to its members or their families. Unions are free to use treasury funds without limit for these purposes. 2 U.S.C. §§431(9)(B)(v), 441b(b); 26 U.S.C. §9012(f)(2)(B). The record in *Republican National Committee, supra,* showed that the AFL-CIO, the Machinists Union and the United Auto Workers together spent $4.5 million on partisan political activity in 1976. 487 F. Supp. 280, 305-306 (S.D.N.Y. 1980) (Joint Findings of Fact).

(4) Partisan communications by a corporation to its shareholders, executives or administrative personnel, or their families. 2 U.S.C. §§431(9)(B)(v), 441b(b). These may be funded by general corporate funds without limit.

(5) Wealthy individuals may make independent expenditures without limit. 26 U.S.C. §9012(f).

(6) Newspapers, broadcasters, periodicals and certain non-profit institutions may engage in independent expenditures. 26 U.S.C. §9012(f)(2).

All other significant activities would be either absolutely prohibited as being in coordination, or would be subject to section 9012(f). It is little wonder that Common Cause has felt the need to emphasize in its brief that American citizens will still have the right to call into talk shows and express their views, even if Common Cause succeeds in this litigation. Common Cause Brief at 40.

These limitations are censorship of content in all but name. Most Americans do not own a newspaper, do not have sufficient wealth to fund independent expenditures, or sufficient power to affect corporate acts, or influence over labor unions. Their only alternative under the law, therefore, is to hope party or campaign officials will provide a means of political involvement. Subjecting the vast majority of citizens to the will of these officials is to condition their speech upon another's approval of its content.

Quite apart from whether national or local campaign organizations have sufficient resources to share with citizens' groups they favor, such campaign organizations will support

only those groups whose activities and message are consistent with those of the official campaign organization. No campaign or party committee worth its salt will be willing to fund individuals and groups to do or say whatever they please. Official campaigns tend to avoid hard ideological stances and shade positions on controversial issues in order to appeal to the widest possible range of voters. The professional politician and the ideologue are constantly at odds over appropriate campaign messages. Making the latter's right to speak conditional upon the approval of the former is straight-out censorship.

Conditioning the right to engage in campaign advocacy upon the approval of local or national party organizations is content regulation. It is regulation which decrees that political debate will be restricted in presidential campaigns to those ideas, messages and slogans selected by professional campaign managers. Anyone with a different message can, as the Common Cause brief callously suggests, "call in to radio talk shows." Common Cause Brief at 40.

This is no imaginary horror. The New York Times has recently reported that the Chairman of the Republican National Committee, the party which allegedly benefited in the recent campaign from independent expenditures, has demanded that conservative political action committees promise not to campaign against Democrats where local Republicans object. New York Times, June 24, 1981, at 17. Mr. Richards, who earlier had charged such committees with making "all kinds of mischief," Newsweek, June 1, 1981, at 38, said that if such a promise were made, "then we can have a semblance of peace." New York Times, *supra*. A law conditioning the speech of the independent committees upon Mr. Richards' approval is government censorship in all but name.

Recognizing the constitutional vulnerability of such a restriction, the court in *Republican National Committee, supra,* upheld the drastic effect of the coordinated expenditure prohibition only because of its view that individuals or groups

are left totally free to fund their activities by means of independent expenditures. As the court said:

> "We similarly conclude that the limitations . . . [on coordinated expenditures by groups or individuals] do not abridge the rights of supporters. The plaintiffs have shown that the effect of the public funding alternative is to decrease the importance of 'grass roots' political activity compared to privately financed campaigns. Private individuals are unable to make expenditures coordinated with the campaign organizations, such as renting vans to distribute literature, paying the cost of photocopying and distributing campaign materials received from the candidate's organization. . . . *Most important, uncoordinated expenditures are permitted without limit. Limitations on uncoordinated expenditures were held unconstitutional in Buckley* v. *Valeo*. . . ." 487 F. Supp. at 286 (emphasis added).

3. The Impact Of Section 9012(f) Is Draconian Rather Than Incidental.

The impact of a literal application of section 9012(f) upon protected speech is draconian. Like all communication, political advocacy is heavily dependent upon the availability and use of communications and other resources. Anyone seeking to purchase or rent such resources for political purposes must compete for them in the market place with others who would put them to other uses. As this Court noted in *Buckley* v. *Valeo,* 424 U.S. 1 (1976),

> "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media

for news and information has made these expensive modes of communication indispensable instruments of effective political speech." 424 U.S. at 19.

A limit of $1,000 on expenditures by groups seeking to engage in political advocacy is for all practical purposes a law forbidding them from engaging in significant political communication. Even at the time of *Buckley,* $1,000 would not purchase a single one-quarter page ad in a major newspaper. 424 U.S. at 40. Today that same $1,000 is worth roughly $550 in 1974 dollars. Indeed, when this Court invalidated section 608(e) of the FECA, it explicitly recognized that a $1,000 limit on independent spending by groups was a *de facto* prohibition on speech by those organizations. The Court noted that a $1,000 limitation "would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication." 424 U.S. at 19-20.

There are vast numbers of American citizens who desire to engage in political advocacy in presidential elections and, if the judgment below is reversed, will not be able to use any of the remaining legal methods of doing so. This is particularly true of individuals who lack great wealth and are not full time party or campaign officials. Such individuals cannot engage in political communication alone. To be even reasonably effective they must be part of a group with access to the necessary resources. The three-judge court in *Republican National Committee* found, for example, that the impact of federal financing on grass roots activities was "dramatic." 487 F. Supp. at 295. Not only did national campaign committees emphasize the mass media over local activities, but the prohibition on coordinated expenditures "clearly curtailed" the funding of grass roots activities from the "bottom up." *Id.,* at 298. As a consequence, campaign headquarters were few and far between, and volunteers near a headquarters had trouble finding things to do. *Id.*, at 294.

The effect of section 9012(f), if read literally and upheld, will be to deny American citizens the sole remaining oppor-

tunity to join their efforts with others in significant political advocacy.

It should be emphasized again that the impact will not be limited to express advocacy of a candidate. Whereas section 608(e)(1), the restriction on independent expenditures struck down in *Buckley,* was limited to advocacy of "the election or defeat" of "a clearly identified candidate," section 9012(f) merely requires a "qualified campaign expense" "to further" the election of a candidate.

As explained above in part IIA2, the all-embracing language of section 9012(f) reaches issue-oriented activities, the dissemination of factual information such as voting records, and perhaps even the work of activist scholars. The room for argument about its impact in particular situations and for expansive interpretations is so great that the chilling effect itself will be enormous. Even Common Cause and the Commission do not share a common position on its terms. Even more ominously, the Commission has in no way foreclosed itself from seeking the broadest application of section 9012(f) in future enforcement proceedings.

4. Section 9012(f) Regulates Expenditures, Not Contributions.

Implicitly recognizing that this Court has ruled in the most explicit fashion that direct expenditures on political communication are constitutionally protected speech, *Buckley, supra* at 19-21, Common Cause now seeks to transform section 9012(f) into a regulation of "contributions" subject to a lower standard of constitutional scrutiny. Common Cause Brief at 21-23. Clearly, section 9012(f), like the ill-fated section 608(e)(1) struck down in *Buckley,* regulates expenditures and is thus a direct regulation of speech. This Court recently reiterated the crucial distinction between regulating "contributions" and regulating "expenditures" in *California Medical Ass'n* v. *Federal Election Commission,* _____ U.S. _____ (June 26, 1981) (Slip Opinion) at 10-16. The Court there

upheld the $5,000 limit on contributions by individuals to multi-candidate committees because it served the compelling purpose of preventing circumvention of the limitation on contributions directly to a candidate. Mr. Justice Marshall's plurality opinion specifically rejected the argument that contributions to a multi-candidate political committee were the equivalent of "expenditures . . . made *independently* by a candidate, individual or group in order to engage directly in political speech." *Id.* at 12-13, citing *Buckley, supra,* at 44-48 (emphasis in original). He concluded, therefore, that direct political expenditures by the California Medical Association were entitled to greater constitutional protection than were its contributions to a multi-candidate committee. *Id.*

The line drawn by this Court thus distinguishes between the regulation of contributions to candidates or groups and the regulation of expenditures used directly to purchase the resources necessary for political speech. Section 9012(f) is an unambiguous limit on spending for political communication and in no sense regulates contributions to groups or candidates. It thus runs afoul of the First Amendment.

Common Cause's argument is principally directed at the method of fundraising and governance of some of the organizations which section 9012(f), read literally, would affect. It is true that some political committees may raise money by mail from contributors who lack direct control over the activities of the organization. If such fundraising and organizational structure represent a danger, however, redress should be in the form of legislation directed to those particular problems, rather than a plea to this Court to uphold a statute restricting direct spending by all "political committees," no matter how they raise their money or how they are governed.

According to the Common Cause argument, First Amendment protection extends only to "personal speech." Common Cause Brief at 20. There is no support for this pernicious suggestion. No court has ever held that a picket is not entitled to constitutional protection unless he or she personally

composes the language on the sign carried, or that advertisements on national issues must be written by those who purchase them. Were such a doctrine accepted, the ability to engage in significant political discussion and advocacy would be limited to a few articulate individuals with great wealth and campaign or party committees to support their messages.

5. Section 9012(f) Infringes Freedom Of Association.

The constitutional recognition of freedom of association as essential to a free society is a recognition of the imperatives of political communication which are even more pressing in our own age. "Personal speech" is of no political significance, except for the few. For those without substantial means, effective speech is available only through participation in groups which raise money and are rarely directly controlled by their membership or contributors. The necessity for preserving such rights has long been recognized by this Court in cases involving contributions to such organizations. *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Shelton* v. *Tucker*, 364 U.S. 479 (1960). In fact, *Buckley, supra*, expressly recognized that a $1,000 limitation on independent expenditures "relative to a clearly identified candidate *precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association.*" 424 U.S. at 22 (emphasis added) (quotations omitted).

B. There Is No Compelling Governmental Interest Justifying A Limitation On Independent Expenditures.

Given the plain fact that Congress did not intend section 9012(f) as a limitation on expenditures independent of a campaign, *see* Part I, *supra*, it could hardly have discerned a compelling need to limit them. In fact, just as appellants' recitation of legislative history touches upon everything but the specific history of section 9012(f), their catalogue of

"compelling interests" served by misreading that section is wholly the product of their attorneys' imagination, rather than a considered judgment by the Congress.

1. Section 9012(f) Does Not Deter Corruption Or The Appearance Of It.

While appellants hint that corruption (or the "appearance" of it) is deterred by their reading of section 9012(f), *Buckley, supra,* is directly contrary to this argument. While *Buckley* held that direct *contributions* to a candidate might be limited in the interest of avoiding corruption or the appearance of corruption, it specifically held that *expenditures* independent of a campaign posed no such danger. As the Court stated,

> "Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, §608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse." 424 U.S. at 47.

Independent expenditures are crucially different from contributions. Groups making independent expenditures may not, under the FECA and Subtitle H, be privy to a campaigner's polls which continuously track not only voters' preferences in particular states but also their views on certain issues and their images of the candidates. These polls are not stable over time, and different polls may not agree. *See generally, Face Off: A Conversation with the Presidents' Pollsters Patrick Caddell and Richard Wirthlin,* 3 Public Opinion 2 (Dec./Jan. 1981). Nevertheless, these polls shape the campaign's detailed strategy, which is the product of discussion of the campaign's professional managers, including

advertising consultants. Different managers and different consultants will not necessarily make the same decisions even when using the same data. Among the decisions to be made are: developing or counteracting certain images, including the means of doing so; stressing or avoiding certain stances on issues and the means of doing so; whether to stress the positive side of one's candidate or to attack the negatives of the adversary and the means of doing so; how to react to unforeseen events during the campaign such as a mistatement by one of the other candidates; how to react to unforeseen events in the nation or the world in a fashion which is effective; in which regions and which states to concentrate the limited resources of the campaign. Each decision must take into account all other decisions. Moreover, these decisions are made and revised continuously as their success or failure becomes evident, polls reveal new trends, or events overtake the campaign.

So long as coordination with campaigns is not permitted, independent expenditures are *not* the equivalent or even rough equivalents of contributions. This is so even when undertaken by well-financed groups, much less by every group capable of raising $1,000. Campaign managers will view any deviation from the current strategy with hostility, no matter how well-intentioned. To them, independent expenditures are more a threat than a benefit.

Moreover, if the prevention of corruption is the purpose of section 9012(f) and independent expenditures are equivalent to contributions, the failure to limit spending by wealthy individuals is inexplicable. The arguments presented to this Court (and accepted by it) in *Buckley* in defense of the FECA's limitations on individual contributions were sharply focused upon the need to limit what one person might give to a candidate. Now the same parties in essence are arguing that the real need is to prevent small contributors from pooling their dollars to be spent by an organization. *Buckley* v. *Valeo*, Brief for Appellees Center for Public Financing of Elections,

Common Cause, League of Women Voters of the United States *et al.*, 46 *et seq.*, 55-58, 65 *et seq.*, and 79-80.

2. Reducing The Influence Of A "Handful" Of Fundraisers Is Not A Compelling Governmental Interest Justifying The Restrictions Of Section 9012(f).

Appellants also argue that section 9012(f), read literally, serves the purpose of reducing the influence of private fundraisers. As the appellants' briefs make clear, even when taken at face value, this allegation is based on "evidence" which came into existence long after Congress passed section 9012(f), and which it could not have foreseen. The development of direct mail fund raising was in an embryonic stage in 1971 and has achieved whatever significance it presently has partly as a consequence of the 1974 FECA, which limited the size of permissible contributions to candidates. Moreover, the "influence" argument is subject to all of the infirmities of the corruption argument, including overbreadth. A statute limiting independent expenditures by organizations to $1,000 is hardly justified by Common Cause's finding that, in their own words, a "handful" of fundraisers have what they regard as undue influence.

In any event, the prevention of corruption, the only compelling purpose recognized in *Buckley, supra,* is an entirely different legislative goal from reducing political influence. As this Court said in *Buckley,* "To the extent that large contributions are given to secure a political *quid pro quo* . . . the integrity of our system of representative democracy is undermined." 424 U.S. at 26-27.

Independent spending, however, is crucially different. If any such obligation is ever created, it arises after the election solely as a consequence of voter persuasion resulting from pure political speech. The money is not given to a candidate to spend as he or she will, thus becoming responsible for the consequences. Independent spending helps or hurts candidates

only to the extent it persuades voters. As a consequence, the "influence" argument is a direct attack on speech designed solely to persuade the voting public.

Common Cause itself alleges that it is an organization of some 225,000 dues-paying members which is designed to influence government. Common Cause, Amended Appendices to Jurisdictional Statement at 72a. Large sums of money are clearly essential to its activities which are, in turn, determined by its officers, who seek influence with elected officials. Its members are "essentially anonymous." Common Cause Brief at 29. The sole difference is that Common Cause seeks to persuade officeholders directly, while independent party groups seek first to persuade voters and then (if in fact they seek to exert direct influence) to persuade officeholders.

If anything, the latter groups' activities more directly involve the democratic process. They raise money through ideological appeals (as do countless issue groups) which they use to persuade voters to vote for candidates sharing similar values. Common Cause quibbles with the district court's assertion that fundraisers must attend to the ideological concerns of donors. Common Cause Brief at 43. That, however, is a notorious political truth. Groups of donors are not fungible. The National Conservative Political Action Committee cannot exchange donor lists with Common Cause or suddenly endorse Dr. Barry Commoner and still continue to raise large amounts of money. Appellants seem to view small donors and voters as helpless pawns prone to react randomly to any appeal no matter who the candidate or what the cause. The First Amendment does not share that bleak view of the American citizen.

C. Section 9012(f), Read Literally, Invidiously Discriminates Among Speakers And Messages.

Political speech is "indispensible to decisionmaking in a democracy" by virtue of its capacity for "informing the public" and cannot be limited on the basis of the "identity of

its source, whether corporation, association, union or individual." *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 777 (1978). A law which forbids speech for some kinds of individuals or groups while permitting it for others amounts to a regulation of the content of speech. *Police Department* v. *Mosley,* 408 U.S. 92 (1972) (ordinance forbidding picketing of schools except by labor organizations).

Section 9012(f), read literally, makes wholly unjustifiable — not to say bizarre — distinctions between speakers and, as a consequence, between political messages. In restricting the speech of political committees but not the speech of individuals, section 9012(f) inherently favors the wealthy. In addition, subsection (2) of section 9012(f) exempts from the $1,000 expenditure limitation (1) expenditures made by the institutional press in communicating news or editorials, and (2) expenditures by certain tax-exempt organizations made in communicating to their members. These exemptions from the otherwise draconian provisions of section 9012(f) render it unconstitutional.

1. Section 9012(f) Unconstitutionally Discriminates According To Wealth.

By restricting its drastic limitations to political committees, section 9012(f) for all practical purposes prevents small contributors from pooling resources in organizations which can fund meaningful political communication. For vast numbers of citizens, this is the only remaining legal avenue for effective political participation in presidential elections. *See supra,* pp. 20-30. For persons wealthy enough to fund their own independent expenditures, however, section 9012(f) imposes no limitation whatsoever. Appellants have suggested no reason, however insubstantial, for silencing groups of small contributors while allowing wealthy individuals unlimited freedom. Such a distinction clearly runs afoul of the Constitution. *Mosley, supra; Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966).

Common Cause's "narrowing" interpretation of section 9012(f), if accepted, would aggravate this already discriminatory legislation. Those appellants suggest that small numbers of individuals who know each other can pool their funds without limit for purposes of political communication, so long as each individual participates in major decisions. The net effect, of course, is to allow wealthy individuals to amplify their voice by pooling their funds in small, affluent groups, limited only by the need for personal contact, while larger groups of persons with more modest means attempting to pool their smaller expenditures are silenced. Any such statutory scheme is *a fortiorari* unconstitutional.

Finally, this interpretation simply does not wash with the statutory scheme. As soon as two individuals join together to form a group, they constitute a "political committee" under FECA. Even if such a group were free to make expenditures under section 9012(f), its efforts to raise money would, of course, be subject to the contribution limitations under FECA. Thus, while an individual could make unlimited expenditures in support of a candidate, two individuals working together would be limited to two times the contribution limit, or $10,000, the maximum the two could contribute to the political committee. 2 U.S.C. §441a(a)(1)(C).

2. Section 9012(f) Cannot Constitutionally Distinguish Between Advertising By Independent Committees And The Press.

This Court has recognized time and again the centrality of a free press to the First Amendment. *See, e.g., Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974); *Mills* v. *Alabama,* 384 U.S. 214 (1966). By exempting the institutional press from the reach of section 9012(f), Congress properly was of the view that the limitations of that section could not be constitutionally applied to such organizations. We vigorously subscribe to that sentiment.

However, at no time has the Court declared that the institutional press is entitled to a preferred position under the First Amendment in expressing editorially its political views. Rather, the Court has spoken of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open," *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964). Communications are no less protected simply because they are made by persons "who wish to exercise their freedom of speech even though they are not members of the press [citation omitted]." *Id.*, 376 U.S. at 266. To conclude otherwise would be to

> ". . . shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities . . . the effect would be to shackle the First Amendment in its attempt to secure the widest possible dissemination of information from diverse and antagonistic sources." *Id.* (Quotation omitted).

Section 9012(f)(2)(A) exempts from its restrictions "editorial" (*i.e.,* advocacy) rights of "broadcasters" and "periodical publications." It does not exempt publishers of books or non-periodical works, of handbills or other, similar publications. While the institutional press plays a crucial role in the dissemination of information and ideas, other groups, like AEP, are equally deserving of the "fullest and most urgent application" of speech rights which the First Amendment reserves for "the conduct of campaigns for political office." *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272 (1971).

While the institutional press may without regard to expenditure limitations publish and disseminate editorials endorsing particular candidates, independent committees may not pay to have such an editorial (or opposite endorsement) republished as an advertisement or handbill without being subject to the $1,000 limit of section 9012(f). This attempt by section 9012(f) to grant preferential speech rights to some at the expense of others "is wholly foreign to the First Amendment. . . ." *Buckley,* 424 U.S. at 49. Committees like AEP,

which intend independently of the candidate to devote their resources to communicate effectively, through scarce and expensive access to modern media, are no less important to political advocacy than is the institutional press, and no less protected under the First Amendment.

3. *Section 9012(f) Unconstitutionally Discriminates In Favor Of Tax-Exempt Organizations.*

Section 9012(f) also exempts "expenditures by any organization described in section 501(c) of this title which is exempt from tax under section 501(a) of this title in communicating to its members the views of that organization." 26 U.S.C. §9012(f)(2)(B). IRC section 501(c) includes a widely diverse class of organizations and associations, many of which have potentially enormous memberships. It includes, for example, labor and agricultural organizations; chambers of commerce; fraternal orders; cooperative telephone companies; cooperative and mutual lending institutions; and contributory pension funds. Allowing the leaders of unions or chambers of commerce to attempt to influence the votes of their members while, at the same time, prohibiting their fellow citizens in other groups from doing so, systematically discriminates not only against speakers, but also against messages.

The fact of the matter is that communications by the U.S. Chamber of Commerce and the UAW to their "members" are in reality communications to large, politically significant segments of the voting population. In 1976, the AFL-CIO, the Machinists Union, and the United Auto Workers together spent $4.5 million on such political advocacy. *See Republican National Committee, supra,* at 305-306 (Joint Findings of Fact). There is thus no rational basis for allowing these economic interest groups to amass gigantic war chests and to engage in unlimited political speech with their "members" while preventing other organizations, such as AEP, from communicating with large segments of the population as well.

D. Section 9012(f) Is Unconstitutionally Vague.

A further defect of section 9012(f) is its lack of any clear delineation between the lawful and the unlawful. This defect in itself chills speech and association: "Uncertain meanings" inevitably lead citizens to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned* v. *City of Rockford,* 408 U.S. 104, 109 (1972) (quotation omitted). An earlier section of this brief has discussed in detail the breadth of section 9012(f)'s language. *Supra* at 20-29. Read literally, it reaches issue discussion, the dissemination of factual material such as voting records, and even support for university scholars.

The analysis of the Court in *Buckley, supra,* compels the conclusion that section 9012(f) is void for vagueness. 424 U.S. at 40-44. Section 608(e)(1) prohibited expenditures "relative to a clearly identified candidate." In order to avoid the vagueness of the term "relative," the Court interpreted the provision in light of the additional requirements in section 608(e)(1) that the expenditure be made "advocating the election or defeat of" a candidate. However, the Court was also concerned that even this did not solve the problem of distinguishing "between discussion of issues and candidates and advocacy of election or defeat of candidates [which] may often dissolve in practical application." 424 U.S. at 42. In order to avoid "invalidation on vagueness grounds," the Court concluded that "§608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 44.

Unlike section 608(e)(1) of the FECA, however, section 9012(f) contains no language on which a saving construction can be based. The language "to further the election of such candidates" does not require that the candidate be "clearly identified" or that the communication be in "advocacy" terms, much less in "express terms." While section 9012(f) contains the additional requirement that the expenditures be

of the nature of "qualified campaign expenses" made by a candidate, that term is itself defined to mean expenses "to further" the candidate's election. 26 U.S.C. §9002(11).

A criminal statute which directly and facially limits expression and association cannot be so vaguely drafted that it forces the lawful to steer so wide of "the unlawful zone" that "[i]t can only result in a deterrence of speech which the Constitution makes free." *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958). Like the statute requiring state employees' oaths in *Baggett* v. *Bullitt,* 377 U.S. 360 (1964), the uncertainty of application of section 9012(f) will in itself tend to suppress speech because persons will restrict their conduct to that which is unquestionably safe — no expenditures over $1,000 in the presidential election.

Common Cause's attempt to "narrow" the meaning of section 9012(f) fails to redeem that statute. Even if "political committees" under section 9012(f) do not include "groups of individuals who engage jointly in personal expression paid for out of their own pockets," Common Cause Brief at 35, the unconstitutional vagueness is not cured. "Personal expression" is hardly a term covering a well-defined set of activities. How disproportionate may the contributions by individuals be, and how active must marginal participants be before the group becomes a "political committee?" May one member of the group undertake the authorship of its advertising, or must all advertising be cleared by every member? Endless questions like these will arise from the Common Cause interpretation with the result that few, if any, individuals will dare run the potential risks of criminal prosecution should their activities fall outside Common Cause's "narrowed" version of section 9012(f). Moreover, litigation over the issue will inevitably involve detailed discovery of the organizational and operational activities of small groups of citizens, a speech-chilling prospect in itself.

CONCLUSION

For the reasons stated above, Appellee Americans for an Effective Presidency respectfully submits that the questions presented by Appellants are not substantial federal questions and, therefore, that their appeals should be dismissed, or, in the alternative, that the judgment entered by the United States District Court for the District of Columbia should be affirmed.

Respectfully submitted,

RALPH K. WINTER
323 Sterling Law Building
127 Wall Street
New Haven, Conn. 06520
(203) 436-4681

RODERICK M. HILLS
ROBERT K. BURGESS *
ROBERT B. SHANKS
EDWARD SONNENSCHEIN, JR.
LATHAM, WATKINS & HILLS
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 828-4400

Attorneys for Appellee
AMERICANS FOR AN
EFFECTIVE PRESIDENCY

* *Counsel of Record*

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Supreme Court of the United States

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No. 80-847

COMMON CAUSE, *et al., Appellants,*
v.
HARRISON SCHMITT, *et al., Appellees.*

No. 80-1067

FEDERAL ELECTION COMMISSION, *Appellant,*
v.
AMERICANS FOR CHANGE, *et al., Appellees.*

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF APPELLEES HARRISON H. SCHMITT, CARL T. CURTIS AND AMERICANS FOR CHANGE

JAN W. BARAN
Counsel of Record

WILLIAM H. SCHWEITZER
REBECCA L. JACKSON
LEE LEVINE
BAKER & HOSTETLER
818 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 861-1500

Counsel for Appellees Harrison H. Schmitt, Carl T. Curtis and Americans for Change

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether 26 U.S.C. § 9012(f) prohibits only expenditures by political committees not authorized by any presidential candidate, which are made in cooperation, consultation or concert with or at the request or suggestion of a presidential candidate or the candidate's authorized political committees or their agents.

2. Whether 26 U.S.C. § 9012(f), if construed to prohibit political committees not authorized by any presidential candidate from making independent expenditures in excess of $1,000 to further the election of a publicly funded presidential candidate, violates the First Amendment guarantees of freedom of expression and association under *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

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STATEMENT OF THE CASE

A. Statutory Scheme

Presidential general election campaigns are governed by the complimentary provisions of the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-55 (1976 & Supp. III 1979) and the Presidential Election Campaign Fund Act ("Fund Act"), 26 U.S.C. §§ 9001-13 (1976 & Supp. III 1979).[1] FECA limits the amount that individuals and groups, including political committees, may contribute to candidates in any election for federal office. 2 U.S.C. § 441a (a)(1) - (3). FECA also limits the amount in a calendar year that individuals or groups may contribute to political committees not authorized by the candidate or established and maintained by a national political party. 2 U.S.C. § 441a(a)(1)(C). The total amount of expenditures that presidential candidates eligible for payments under the Fund Act may make are limited under FECA. 2 U.S.C. § 441a(b).

FECA requires political committees[2] to file statements of organization within 10 days of formation. 2 U.S.C. § 433(a). This statement provides information about the committee, including the type of committee, and whether it is affiliated with any other committee or authorized by any candidate. 2 U.S.C. § 433(b). Thereafter political committees must file pre- and post-election and quarterly reports with the Federal Election Commission ("FEC") regarding all contributions made and received and all

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[1] Except as otherwise noted, all citations relating to FECA will be to the current version and to 2 U.S.C. All citations to the Fund Act will be to the current version and to 26 U.S.C.

[2] *See* 2 U.S.C. § 431(4)(A) ("any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year"); 26 U.S.C. § 9002(9) ("any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office"); 11 C.F.R. § 9002.9 (1981); note 38 *infra*.

expenditures and disbursements. 2 U.S.C. § 434. For expenditures or contributions above $200, the identity of the source or recipient must also be reported. *Id.*[3]

The Fund Act provides for the public funding of general presidential election campaigns through the Presidential Election Campaign Fund ("Fund"), which is financed by a voluntary taxpayer check-off system. Presidential candidates of a political party who satisfy the requirements of 26 U.S.C. § 9003 can elect to receive payments from the Fund to defray campaign expenses incurred by the candidates or their authorized committees. 26 U.S.C. § 9004(c); *see* 26 U.S.C. § 9002(11) (definition of qualified campaign expense). Candidates who make such an election must agree not to incur aggregate expenses in excess of the public payment and not to accept private contributions to defray campaign expenses. 26 U.S.C. §§ 9002(4), 9003; *see* 2 U.S.C. § 441a(b) (expenditure limit). Individuals and groups are prohibited by FECA from making expenditures in coordination with the candidate, the candidate's authorized committees or their agents, since such expenditures are defined as contributions. 2 U.S.C. § 441a(a)(7)(B).The Fund Act has never defined "contribution" or "expenditure."

Section 9012(f) of the Fund Act, which the three-judge court found unconstitutional,[4] prohibits unauthorized political committees from making expenditures[5] in excess of $1,000 which would constitute qualified campaign expenses if incurred by an authorized committee of a presidential candidate. 26 U.S.C. § 9012(f). A political committee that violates § 9012(f) is subject to criminal penalties. 26 U.S.C. § 9012(f)(3).

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[3] FECA requires all solicitations and communications that expressly advocate the election or defeat of a clearly identified candidate by an unauthorized political committee to include a disclaimer, identifying the committee responsible for the solicitation or communication and stating that it was not authorized by any candidate. 2 U.S.C. § 441d.

[4] *See* FEC v. Americans for Change, Nos. 80-1609 & 80-1754, at 1a, 24a (D.D.C. Sept. 30, 1980)(three-judge court) [hereinafter cited as *FEC* v. *AFC* with page citations to Appendix to Jurisdictional Statement, Common Cause v. Schmitt].

[5] *See* 2 U.S.C. § 431(17); 11 C.F.R. § 109.1(a) (1981).

B. Facts of These Cases

Appellee Americans for Change ("AFC"), a political committee founded by 100 individuals, registered with the FEC on May 23, 1980, pursuant to 2 U.S.C. § 433.[6] Appellees Harrison H. Schmitt and Carl T. Curtis are the Chairman and Treasurer respectively of AFC. Appellees Americans for an Effective Presidency ("AEP") and Fund for a Conservative Majority ("FCM") are also political committees. *FEC* v. *AFC* at 3a.

During the 1980 presidential election campaign, AFC raised money by means of limited contributions from individuals and other political committees in accordance with FECA.[7] AFC made independent expenditures in support of Ronald Reagan and George Bush, the Republican candidates for President and Vice President. *Id.* at 3a-4a. AFC's independent expenditures included letters, fliers, buttons, bumper strips and newspaper and radio advertisements advocating Ronald Reagan's election and AFC's views on campaign issues.[8] AFC made no contributions to Ronald Reagan or any of his committees. AFC reported all receipts and disbursements in accordance with 2 U.S.C. § 434.[9]

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[6] Because it registered on May 23, 1980, AFC did not qualify as a "multicandidate committee" until after the November 1980 election. *See* 2 U.S.C. § 441a(a)(4). AFC is an independent committee. It is neither "affiliated" with any other committee nor "connected" with any other organization. *See* 11 C.F.R. § 100.5(g) (1981) (definition of "affiliated committee"); 2 U.S.C. § 431(7) (definition of "connected organization").

[7] 2 U.S.C. § 441a. This provision bars AFC from accepting a contribution in excess of $5,000 from any source in a calendar year.

[8] *See* Exhibits to Jurisdictional Statement, Common Cause v. Schmitt, at 2b-9b. See Appendices A & B *infra* for examples of radio and newspaper advertisements purchased by AFC.

[9] The FEC's "Data Compiled From the Public Records of The Federal Election Commission" ("FEC Data"), by the FEC's own admission, may contain errors. FEC Data, at II (FEC admission). Moreover, the FEC's data contains information pertaining to parties, including separate segregated funds established by corporations, unions or trade associations, not before this Court and not at issue herein. The data does not advise the Court of the individual expenditures made by AFC, or contributions received by AFC. *See* note 31 *infra*.

C. The Proceedings Below

On July 1, 1980 Common Cause, David Cohen and Winifred Long (hereinafter collectively referred to as "Common Cause") sued AFC seeking an order declaring that AFC violated 26 U.S.C. § 9012(f) and enjoining Schmitt, Curtis and AFC from making expenditures in support of Ronald Reagan's candidacy.[10]

On July 15, 1980 the FEC moved to intervene in the Common Cause action and filed a separate complaint against AFC and two other political committees, AEP and FCM. The FEC complaint sought a declaration that § 9012(f) prohibited expenditures, including independent expenditures, in excess of $1,000 by unauthorized political committees in support of a publicly funded presidential candidate. Common Cause moved to intervene as party plaintiff in the FEC action and to consolidate both cases.[11]

The FEC and AFC moved to dismiss the Common Cause action on the ground that the three-judge court lacked subject matter jurisdiction. AFC and the FEC opposed Common Cause's motion to intervene in the FEC action.

AFC, along with AEP and FCM, moved for summary judgment in the FEC action. AFC argued that § 9012(f) should be construed to permit independent expenditures but to prohibit political committees from making expenditures requested or authorized by the candidate or the candidate's committees. Alternatively, AFC, along with AEP and FCM, argued that § 9012(f) is facially unconstitutional under the First Amendment.

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[10] Count I of Common Cause's complaint alleged that AFC's activities, even if independent of the official Reagan campaign, violated § 9012(f). Count II alleged that AFC was not independent of the official Reagan campaign and, as a result, its expenditures were contributions to the official Reagan campaign in violation of the Fund Act. Common Cause did not appeal the judgment of the three-judge court that it lacked subject matter jurisdiction over Count II. Jurisdictional Statement, Common Cause v. Schmitt, at 10 n.15. Following the three-judge court's dismissal of Count II, Common Cause reasserted its claims in an administrative complaint filed with the FEC pursuant to 2 U.S.C. § 437g. That complaint is still pending.

[11] Common Cause amended its complaint to add AEP and FCM as defendants.

On August 28, 1980 the three-judge court granted judgment for appellees in the FEC action, dismissed Count I of Common Cause's amended complaint on the basis of the ruling in the FEC action and dismissed Count II for lack of subject matter jurisdiction. The FEC's motion for summary judgment was denied.

The opinion of the court was issued on September 30, 1980. The court held that § 9012(f) is unconstitutional on its face under the First Amendment and the decisions of this Court in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (*per curiam*) and *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *aff'd*, 445 U.S. 955 (1980). *See FEC* v. *AFC* at 14a-24a.

SUMMARY OF ARGUMENT

I.A. Section 9012(f) applies to unauthorized committees and limits to $1,000 "expenditures to further the election of" a publicly funded candidate. The FEC has promulgated regulations that define expenditures that "further" an election as expenditures that are within the candidate's control or that have been authorized or requested by the candidate. 11 C.F.R. § 9002.11(b)(1), (2) (1981). Accordingly, § 9012(f) does not limit expenditures that have been made independently of any candidate.

B. 1. A construction that § 9012(f) does not limit independent expenditures by unauthorized committees is supported by the legislative history of the Fund Act and FECA. Prior to considering the Fund Act and § 9012(f), the Senate addressed limits on independent expenditures by passing FECA. Title I of FECA effectively prohibited any independent expenditure for "media communications" and required independent groups to obtain the candidate's permission prior to making an expenditure. Title I was held unconstitutional. *ACLU* v. *Jennings*, 366 F. Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom. Staats* v. *ACLU*, 422 U.S. 1030 (1975). Title I was repealed and replaced by 18 U.S.C. § 608(e), which limited all independent expenditures to $1,000. Section 608(e) was held unconstitutional in *Buckley* v. *Valeo*, 424 U.S. 1, 51 (1976). Congress has always addressed limits on independent spending for political expression through FECA, not the Fund Act.

2. The legislative history of the Fund Act demonstrates that § 9012(f) is designed to limit contributions that result from coordinated expenditures and not independent expenditures. The Fund Act's sponsor, Senator Pastore, made clear that § 9012(f) was not intended to apply to groups organized as committees and acting independently of any candidate. Senator Pastore noted that Congress, in enacting § 9012(f), did "nothing to impinge freedom of speech and freedom of activity. So long as the candidate knows nothing about it and there is no subterfuge about it, the people are entitled to act as they will." 117 Cong. Rec. 42626 (1971) (remarks of Sen. Pastore).

3. Until this case, the FEC utilized § 9012(f) in its regulations to support limits on coordinated expenditures, not independent expenditures. All FEC regulations must be submitted to each house of Congress and are subject to a legislative veto. *See* 26 U.S.C. § 9009(c); 2 U.S.C. § 438(d). All FEC regulations that were based on § 9012(f) and promulgated after public hearings addressed coordinated spending and were not vetoed by either house. 11 C.F.R. § 146.1 (1980) (repealed 1980); *id.* § 110.7(b)(5) (1979) (repealed 1980). The FEC, like Congress, did not construe § 9012(f) as a limit on independent expenditures.

II.A.1. If construed to limit independent expenditures by political committees, § 9012(f) unconstitutionally infringes freedom of expression and association. *Buckley* recognized that expression and association are entitled to receive maximum First Amendment protection. 424 U.S. at 14-23.

2. If construed to limit independent expenditures by political committees, § 9012(f) is no different than the expenditure limitation struck down by *Buckley* as an impermissible infringement on freedoms of expression and association. Since "virtually every means of communicating ideas in today's mass society requires the expenditure of money," *id.* at 19, expenditure limitations such as § 9012(f) impermissibly restrain the quantity of political expression in election campaigns. Section 9012(f) restricts "the number of issues discussed, the depth of their exploration and the size of the audience reached during a presidential campaign." *Id.*

Buckley's holding that the quantity of expression by "independent associations" may not be limited under the First Amendment, *id.* at 22, establishes that the quantity of such speech by political committees in presidential campaigns may not be constitutionally restricted. The inherent worth of political expression in exposing the public to "uninhibited, robust and wide-open" debate is not altered by the nature of the speaker, whether it is a wealthy individual, an informal small group or a political committee. *FEC* v. *AFC* at 23a (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)); *accord, First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785 (1978). Independent expenditures, including those by political committees, in publicly funded presidential campaigns "are permitted without limit" since "limitations on uncoordinated expenditures were held unconstitutional in *Buckley* v. *Valeo*." *Republican National Committee, supra*, 487 F. Supp. at 286.

3. An expenditure limitation such as § 9012(f) impermissibly interferes with the quality of political expression achieved through group association. *Buckley, supra*, 424 U.S. at 22. This associational right "is diluted if it does not include the right to pool money through contributions for funds are often essential if 'advocacy' is to be truly or optimally effective." *Id.* at 65-66. Section 9012(f), as a restraint on "the ability of independent associations . . . to expend resources on political expression," simultaneously interferes with " 'the freedom of [their] adherents.' " *Id.* at 22-23 (quoting *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250-51 (1957)). As an independent political committee, AFC is a group of individuals who have joined together to engage in effective political expression. The "pooled" contributions permit AFC to communicate its views more effectively by purchasing time on radio and space in newspapers, and hiring professionals to prepare, package and place its advertisements. As construed by appellants, § 9012(f) impermissibly restrains effective political expression by AFC.

4. Section 9012(f) is an expenditure limitation and infringes the freedoms of expression and association far more severely than the limits on contributions upheld in *Buckley*. Contribution limitations restrict the freedom of contributors to voice the inten-

sity of their support for the candidate, but permit undifferentiated "symbolic expression of support" without infringing the contributor's freedom to speak independently of the candidate or to become a member of any political organization. *Buckley, supra*, 424 U.S. at 22-23. In contrast, § 9012(f) is a direct and substantial restraint on AFC's political expression. The term "political committee" as defined by the federal election laws and interpreted by the FEC encompasses any independent group that undertakes political activities in support of a presidential candidate. 26 U.S.C. § 9002(a); 2 U.S.C. § 431(4); 11 C.F.R. §§ 9002.9, 100.5 (1981). As construed by the court below, § 9012(f) prohibits all groups — large or small, formal or informal — from effectively communicating views that support a publicly funded presidential candidate. *See Buckley, supra*, 424 U.S. at 22-23; *California Medical Association* v. *Federal Election Commission*, 49 U.S.L.W. 4842, 4846 (U.S. June 26, 1981) (No. 79-1952) (plurality opinion of Marshall, J.).

B. To be constitutionally permissible, § 9012(f) must (1) serve a compelling governmental interest; (2) do so narrowly; and (3) constitute the legislative alternative least restrictive of First Amendment rights. *See Buckley, supra*, 424 U.S. at 45-51; *Bellotti, supra*, 435 U.S. at 786; *FEC* v. *AFC* at 10a-13a. *Buckley* held that a limitation on independent expenditures such as § 9012(f) cannot satisfy this "exacting scrutiny" and is unconstitutional. 424 U.S. at 44.

1. In *Buckley* this Court held that the only governmental interest sufficiently compelling to support restrictions on First Amendment rights is "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions" on candidates. *Id.* at 25. The Court concluded that "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential officeholders," *id.* at 26-27, the government has a compelling interest in prohibiting the practice. The Court held that the "appearance of corruption" inherent in the act of making a campaign contribution to a candidate is a compelling reason to limit the size of all such contributions. *Id.* at 27-29.

2. *Buckley* held that "the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify . . . [a] ceiling on independent expenditures." *Id.* at 45. By definition, an "independent expenditure" is made in the absence of any prior consultation or other prearrangement with a candidate or the candidate's campaign. *FEC* v. *AFC* at 6a; *see* 2 U.S.C. § 441a(a)(7)(B)(i). Absent prearrangement between citizen and candidate, there can be no corruption because the lack of prior consultation with the candidate or the candidate's campaign "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate" and eliminates even the appearance that a corrupt agreement has been struck. *Buckley, supra*, 424 U.S. at 47. Contrary to the view of democracy espoused by appellants, no problem of corruption is created when a political committee (or any person) earns some measure of loyalty from a candidate because it effectively advocates the candidate's election. Any resulting loyalty constitutes no more than salutary responsiveness to a political constituency — the core of our system of representative government.

3. *Buckley* held that a limitation on independent expenditures such as § 9012(f) is unnecessary to prevent the reality or appearance of corruption because alternative measures less restrictive of First Amendment rights fully serve that governmental interest. *Id.* at 55. Even without limitations on independent expenditures, FECA and the Fund Act contain a comprehensive set of (1) prohibitions and limitations on contributions, *see* 26 U.S.C. § 9003(b); 2 U.S.C. § 441a(a)(1)(C); (2) regulation of "coordinated" expenditures, *see id.* § 441a(a)(7)(B)(i); and (3) disclosure requirements, *see id.* §§ 433-34, that prevent the opportunity for corrupt *quid pro quo* arrangements. Under this existing statutory framework, a limitation on independent expenditures is unconstitutional because " '[i]n the area of First Amendment freedoms, government has the duty to confine itself to *the least* intrusive regulations which are adequate for the purpose.' " *Buckley, supra*, 424 U.S. at 238 (opinion of Burger, C.J.) (quoting *Lamont* v. *Postmaster General*, 381 U.S. 301, 310 (1965) (Brennan, J., concurring)).

ARGUMENT

I. SECTION 9012(f) DOES NOT LIMIT EXPENDITURES THAT ARE MADE WITHOUT THE REQUEST OR AUTHORIZATION OF A PUBLICLY FUNDED PRESIDENTIAL CANDIDATE.

A. Properly Construed 26 U.S.C. § 9012(f) Limits Only Expenditures That Have Been Requested Or Authorized By A Candidate, Not Independent Expenditures.

"[I]f a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).

The proper reading of 26 U.S.C. § 9012(f) in relation to other provisions of the Fund Act, FECA and FEC regulations restricts its application to expenditures, authorized or requested by a presidential candidate, that are made by unauthorized political committees.[12] Section 9012(f)(1) provides, in pertinent part, that:

> [I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur *expenditures to further the election of such candidates*, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates in an aggregate amount exceeding $1,000.

26 U.S.C. §9012(f)(1) (emphasis added). Violation of § 9012(f)(1) constitutes a criminal act punishable by fines and imprisonment. 26 U.S.C. § 9012(f)(3). Section 9012(f)(1) does not limit independent expenditures in support of a candidate.[13] So construed,

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[12] The Fund Act does not define "unauthorized committee." The FEC, however, has specified that "[a]n 'unauthorized committee' is a political committee which has not been authorized in writing by a candidate to solicit or receive contributions or make expenditures on behalf of such candidate." 11 C.F.R. § 100.5(f)(2) (1981). All political committees subject to federal campaign financing laws are either "authorized" or "unauthorized." *Id.* AFC is an unauthorized committee.

[13] An independent expenditure is:

§ 9012(f) preserves the constitutional right of individuals and associations to make independent expenditures in support of a candidate.

The scope of § 9012(f)(1) must be based on a determination of what constitutes "expenditures to further the election" of a candidate.[14] Neither FECA nor the Fund Act defines this phrase. However, its meaning is discernible from statutory and regulatory provisions that use and narrowly construe this term.

A "qualified campaign expense" means an expense incurred by eligible candidates[15] or their authorized committees[16] "to further the election" of such candidates. 26 U.S.C. § 9002(11). The FEC defines an expenditure that "furthers" the election of eligible candidates as follows:

> An expenditure is made *to further* a Presidential or Vice Presidential candidate's campaign if it is incurred by or *on behalf of* such candidate or his or her authorized committee.

11 C.F.R. § 9002.11(b)(1) (1981) (emphasis added).

> an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

2 U.S.C. § 431(17); *see* 11 C.F.R. § 109.1(a)(1981). Virtually every word in this definition is a term of art. *See* 2 U.S.C. § 431(2), (6), (9), (11), (18) (definitions of "candidate," "authorized committee," "expenditure," "person," and "clearly identified," respectively); 11 C.F.R. § 109.1(b)(2), (4), (5) (1981) (definitions of "expressly advocating," "made with the cooperation," and "agent," respectively).

[14] By its terms, § 9012(f)(1) limits unauthorized committees from incurring "expenditures to further the election of" presidential candidates.

[15] *See* 26 U.S.C. § 9002(4) (defining eligible candidates); 11 C.F.R. § 9002.4 (1981) (same).

[16] *See* 26 U.S.C. § 9002(1) (defining authorized committees); 11 C.F.R. § 9002.1(a)(1981) (same).

FECA and FEC regulations implementing both FECA and the Fund Act define when an expenditure is "on behalf of" an eligible candidate:

> [A]n expenditure is made on behalf of a candidate . . . , if it is made by
>
> (i) an authorized committee or any other agent of the candidate for purposes of making any expenditure; or
>
> (ii) any person *authorized or requested* by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.

2 U.S.C. § 441a(b)(2)(B) (emphasis added); 11 C.F.R. §§ 110.8(g)(1)-(2), 9002.11(b)(2) (1981).

It follows that an "expenditure to further the election of such candidates" is an expenditure made "on behalf of" the candidates. Under FECA and FEC regulations, an expenditure by an unauthorized political committee is "on behalf of" a presidential candidate *only if* the expenditure has been "authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate."

In the court below, Common Cause argued that this construction would render "unnecessary" the proviso in § 9012(f) concerning expenditures that "would constitute qualified campaign expenses if incurred by an authorized committee of [the] candidate[ ]." *FEC* v. *AFC* at 7a. Common Cause asserted that even in the absence of § 9012(f), the Fund Act would treat coordinated expenditures as "qualified campaign expenses." Common Cause overlooked the fact that an authorized committee is a political committee that has been authorized by the candidate *in writing* "to incur expenses to further the election of" the candidate. 26 U.S.C. § 9002(1). Expenditures incurred by an authorized committee are *a priori* "authorized" or coordinated, and therefore are qualified campaign expenses. In the case of unauthorized committees such written authorization does not exist. Consequently there was a necessity to restrict those activities of an unauthorized committee which were tantamount to contributions, *i.e.*, coordinated expenditures. This need was satisfied through § 9012(f).

Common Cause also argued against AFC's construction because FECA specifically includes within the definition of "contribution" any "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate." 2 U.S.C. § 441a(a)(7)(B)(i); *FEC* v. *AFC* at 7a. Common Cause argued that § 441a(a)(7)(B)(i) renders § 9012(f) redundant if the latter provision is construed to limit only coordinated expenditures. However, § 441a(a)(7)(B)(i) did not exist at the time § 9012(f) was enacted.[17] Between 1971, the time of enactment of the Fund Act, and 1974 neither § 441a(a)(7)(B)(i) nor any predecessor was in effect. There was no need for such a provision during that time. Until 1974 there were no generally applicable limits on contributions to federal candidates.[18] Only the Fund Act barred publicly funded candidates and their authorized committees from accepting any private contribution.

In this historical context, § 9012(f) must be construed as a contribution limit. It imposes criminal sanctions on unauthorized political committees that make expenditures on behalf of a candidate after coordinating their efforts with the candidate or the candidate's representatives. All parties concede in these cases that appellees, including AFC, have not coordinated their expen-

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[17] The current version of § 441a(a)(7)(B)(i) was enacted in 1976, five years after the Fund Act. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112, 90 Stat. 488. A prior version was enacted in 1974. 18 U.S.C. § 608(c)(2)(B) (repealed 1976); Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263.

[18] *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263. In 1971 Congress anticipated that there could be insufficient monies in the Fund to finance totally the campaigns of all candidates who qualified under the Fund Act. 117 Cong. Rec. 42622 (1971) (remarks of Sen. Mathias). Congress accordingly provided that in the event of a deficiency in the Fund, *see* 26 U.S.C. § 9006(c), candidates would be able to receive private contributions, *id.* §§ 9003(b)(2), 9012(b)(1). Prior to 1974, there were no generally applicable limits on contributions to candidates. Section 9012(f) nevertheless limits to $1,000 the amount that an unauthorized committee could contribute to an eligible candidate in the event of a deficiency in the Fund.

ditures with any eligible candidate. *See* note 10 *supra*; note 61 *infra*. Section 9012(f) does not apply to appellees.

B. The Legislative History Of 26 U.S.C. § 9012(f), The Fund Act And FECA Demonstrate That Congress Did Not Intend 26 U.S.C. § 9012(f) To Limit Independent Expenditures.

Appellants argue that § 9012(f) is an integral portion of the Fund Act, which is designed to curtail expenditures by political committees that are independent of any candidate. Brief of Appellant FEC at 19-20; Brief of Appellant Common Cause at 26. Appellants cite no legislative history that reflects a congressional intent to limit the independent activities of unauthorized political committees such as appellees. The legislative history of the Fund Act and concurrent as well as subsequent campaign financing legislation demonstrates that Congress did not intend to apply § 9012(f) to independent expenditures.

1. As enacted in 1971, Title I of FECA, not 26 U.S.C. § 9012(f), curbed independent expenditures by individuals and political committees.

Section 9012(f) should be construed by examining its relationship with other campaign financing laws in effect or under consideration by Congress *in 1971,* the year of its enactment. Viewed in this cross-light, it is apparent that Congress chose a vehicle other than § 9012(f) or the Fund Act as a means of limiting independent political speech. That other vehicle was Title I of the original FECA. *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, Title I, 86 Stat. 3-8 (1972).

Title I imposed a limit on all campaigns for federal office with respect to the amount that could be spent for the use of "communications media," including broadcasting stations, newspapers, magazines, outdoor advertising facilities and telephones. *Id.* § 102, 86 Stat. 3. The limitation was enforced by requiring broadcast licensees and other vendors of "communications media" to obtain written certification from the candidate on whose behalf any person wished to purchase advertising. *Id.* § 104, 86 Stat. 6. The candidate had to certify that the advertising

expense would not exceed the applicable expenditure limit. *Id.* The effect of this licensing scheme was accurately described by Senator Hart:

> No one can place an advertisement specifically endorsing my candidacy unless I sign off on it. So people cannot campaign independently for me as much as they want. Indeed, under existing law, by refusing to sign off, I can prevent them from campaigning at all, at least with regard to advertisements in the media covered by the Act. And even if I do not choose to prevent their advertisements on my behalf, if I have already used my full allotment of media expenditures, I cannot sign off and they cannot have the ad accepted by the station or newspaper.

119 Cong. Rec. 26315 (1973).

FECA, including Title I, was considered and passed by the Senate *three months before* Senate consideration and passage of the Fund Act. *See* 117 Cong. Rec. 30077 (1971). At the time the Fund Act was introduced, its sponsor, Senator Pastore, described its relationship to the previously passed FECA, which had been designated S. 382:

> [Under the Fund Act] a presidential candidate has the discretion of deciding whether he will accept public financing or finance his campaign privately. If he elects to accept public financing, he is limited in his expenditure to the extent provided in the [Fund Act]. If he elects to finance his campaign privately the limitations contained herein for publicly financed campaigns would not apply. However, the limitations contained in the legislation that passed the Senate on August 5 — S. 382 — the Federal Election Campaign Act of 1971 would apply.

Id. at 41762.

By the operation of Title I of FECA, *all* candidates whether privately or publicly financed were subject to limits on expenditures for "communications media." Publicly financed presidential candidates were subject to an additional overall limitation. Under either funding system, Title I required advertisers to obtain written certification from a candidate before selling advertising time or space. This certification was originally required because Congress wanted candidates to control *all* media expenditures on their behalf, even those that otherwise would be

independent of the campaign. *Id.* If the original Fund Act and FECA had been in effect for the 1980 presidential campaign, appellees would not have been able to make *any* media expenditures unless a broadcaster or other advertiser had first obtained Ronald Reagan's written certification that the Title I media expenditure limit would not be exceeded. Under this original statutory scheme there could be no independent expenditures since Title I of FECA required that all expenditures be approved in advance by the candidate.

During the debate on the Fund Act, Senator Pastore was confronted with questions concerning independent political activity. He cited FECA, not § 9012(f), as the vehicle that controlled independent spending. Specifically, he was asked by Senator Goldwater:

> [W]hat is there to stop me from supporting the candidate of my choice, by forming a committee without his knowledge, without his having any way of knowing about my committee, and, under my constitutional rights and the constitutional rights of those associated with me, to spend that money, to buy television advertising that he knows nothing about, to buy radio advertising — and use it — which he knows nothing about, to spend it in any way I see fit?
>
> * * *
>
> . . . Suppose [a candidate's] brother buys some time on television and the candidate says, "I did not know my brother was spending money that way." There is no way we can prevent that.

Senator Pastore replied:

> That is covered by S. 382 [FECA]. I keep repeating that. What we are trying to do is to characterize this particular bill [the Fund Act] as complimentary legislation on campaign expenditures and campaign financing. This is the financing part.
>
> * * *
>
> On the proposition the Senator is talking about, *we took care of that three months ago when we passed [FECA].*

Id. at 41953 (emphasis added). FECA, not the Fund Act, addresses limits on independent expenditures.

The ten-year history of campaign financing legislation demonstrates that Congress has consistently addressed indepen-

dent expenditures through FECA. A three-judge court subsequently held that Title I violated the First Amendment. *ACLU* v. *Jennings,* 366 F. Supp. 1041, 1051 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom. Staats* v. *ACLU,* 422 U.S. 1030 (1975). In response, Congress revised its approach to independent expenditures by enacting a $1,000 limit on all independent expenditures. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1265; *see* S. Rep. No. 689, 93d Cong. 2d Sess. 18-19 (1974), *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 114-15 (1977). This provision, former § 608(e) of the Criminal Code, was also declared unconstitutional in *Buckley* v. *Valeo,* 424 U.S. 1, 51 (1976).

Congressional attempts to limit independent political activity were never contingent on a public funding system. As Congress stated:

> While independent expenditures pose a difficult question, it should be emphasized that *the need to control them does not arise from public financing.* Whether campaigns are funded privately or publicly such controls are imperative if Congress is to enact meaningful limits on direct contributions.

S. Rep. No. 689, 93d Cong., 2d Sess. 18 (1974), *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 114 (1977) (emphasis in original).

Since *Buckley,* Congress has repeatedly acknowledged that the First Amendment forbids it from legislating dollar limits on expenditures for independent political speech. The legislative history of the 1976 Amendments to FECA is replete with statements revealing legislators' understanding that *Buckley* bars any such expenditure limits on individuals or groups.[19] Congress

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[19] 122 Cong. Rec. 7186 (1976) (remarks of Sen. Buckley) ("the practical consensus of [the *Buckley*] decision is that we are going to see more and more well-organized, well-financed groups operating outside of an individual campaign, parallel to it, but independently"); *id.* at 7187 (remarks of Sen. Kennedy) (*Buckley's* rejection of limits on "independent spending" created need for legislation concerning disclosure and requirement that such spending be "genuinely independent"); *id.* (remarks of Sen. Cannon)(a total ban on con-

interpreted *Buckley* as forbidding limits on independent expenditures by political committees even with respect to publicly financed candidates. Senator Cannon, chairman of the Senate Committee on Rules and Administration and floor manager of the 1976 amendments to FECA, noted during hearings:

> Of course, under the Court's decision [in *Buckley*] if we went to the public financing aspect, then we could get back to the limitation on expenditures, but it would go only by the candidate itself and still would not apply to the independent person or to the committee.

Federal Election Campaign Act Amendments of 1976: Hearings on S. 2911, S. 2911 — Amendment No. 1396, S. 2912, S. 2918, S. 2953, S. 2980 and S. 2987 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 94th Cong., 2d Sess. 177 (1976), *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1976, at 183 (1977). The Senate floor manager believed that an expenditure limit "would not apply to the independent person or to the committee" that made expenditures on behalf of a publicly financed candidate.

In lieu of limits on independent expenditures by committees, Congress chose for the first time to limit the amount that an individual may contribute to an independent committee, 2 U.S.C. § 441a(a)(1)(C), and the amount that a committee may contribute to

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tributions by political committees to candidates would still leave committees free to "make their own independent expenditures"); *id.* at 8882 (remarks of Rep. Gaydos)(with respect to "independent expenditures, the Supreme Court has limited the manner of regulating Federal elections"); *id.* at 12199 (remarks of Rep. Hays)(*Buckley* held that a limit on independent expenditures "impermissibly intruded on the right of individuals and groups to use their resources to state their own views on political matters"); H. Rep. No. 917, 94th Cong., 2d Sess. 5 (1976), *reprinted in* Legislative History of the Federal Election Campaign Act Amendments of 1976, at 805 (1977)(In response to *Buckley,* Congress legislated "full reporting and disclosure by individuals and groups that make 'independent expenditures' " but simultaneously safeguarded "the full enjoyment of the First Amendment right of individuals and groups to make expenditures for political expression.")

another committee, *id.* § 441a(a)(2)(C). *See* 122 Cong. Rec. 6692-93 (1976) (remarks of Sen. Cannon). In addition, increased disclosure requirements were imposed on political committees that make independent expenditures, 2 U.S.C. § 434(b)(13) (1976) (amended 1979), and specific disclaimers of candidate authorization were required on independent political advertising that expressly advocates the election or defeat of a clearly identified candidate, *id.* § 441d.

Notwithstanding these specific congressional responses to *Buckley vis a vis* independent expenditures, the legislative history of the 1976 amendments, which included amendments to the Fund Act, does not contain a single reference to § 9012(f). There is no suggestion that independent expenditures could be limited, or were ever intended to be limited, under § 9012(f).

The legislative history of the Fund Act establishes that Title I of FECA and subsequently § 608(e), not § 9012(f), were the vehicles chosen by Congress to limit independent expenditures. Once those limits were held unconstitutional in *ACLU* v. *Jennings* and *Buckley,* Congress believed it was powerless to limit independent expenditures.

2. The legislative history of the Fund Act demonstrates that 26 U.S.C. § 9012(f) was not intended to limit independent expenditures by political committees.

As originally enacted FECA reflected an unambiguous congressional intent to limit independent expenditures for media communications. There is no corresponding legislative history with respect to the Fund Act or § 9012(f). To the contrary, the legislative history reflects a congressional intent that § 9012(f) operate as a limit on direct contributions by an unauthorized committee as well as a limit on expenditures that are tantamount to contributions, *i.e.,* coordinated expenditures.

Section 9012(f) was part of the Fund Act as introduced by Senator Pastore. *See* 117 Cong. Rec. 41758-61 (1971). The original version of § 9012(f)(1) read as follows:

> It shall be unlawful for any political committee which is not an authorized committee with respect to the eligible can-

> didates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, *or to make contributions to such candidates or any of their authorized committees to be used directly or indirectly, to defray qualified campaign expenses,* in an aggregate amount exceeding $1,000.

Id. at 41761 (emphasis added). The italicized language remained in § 9012(f) until the Conference Committee deleted it without explanation. Throughout Senate debate on the Fund Act, § 9012(f) expressly referred both to a limitation on *expenditures* "to further the election of such candidates which would constitute qualified campaign expenses if incurred by an authorized committee" and to a limitation on *contributions* to candidates "to be used, directly or indirectly, to defray qualified campaign expenses." When read together, these provisions reveal a congressional concern that publicly funded candidates for president not defray campaign expenses either by accepting private contributions or by accepting the virtually identical benefit of expenditures by unauthorized committees. The common thread between contributions and coordinated expenditures is that they both come within the control of the candidate or the candidate's agents. Congress wished to prevent candidates from circumventing the expenditure limit by requesting unauthorized committees to incur campaign expenses.

Remarks by legislators, particularly Senator Pastore, reflect congressional concern with contributions to candidates and not with independent activity. Senator Pastore categorically stated that:

> [W]e do nothing to impinge freedom of speech and freedom of activity. So long as the candidate knows nothing about it and there is no subterfuge about it, the people are entitled to act as they will.

Id. at 42626.

Suggestions that § 9012(f) would apply to independent spending were rejected. In conjunction with an amendment offered by Senator Taft, Senator Pastore discussed enlarging the scope of § 9012(f) to include independent activity and expanding the types of

organizations subject to its limit. The debate demonstrates Senator Pastore's refusal to make § 9012(f) applicable to independent activity:

> Mr. PASTORE. [L]et us assume that a group on a campus, say faculty members, got together and formed a committee. Does the Senator mean to tell me they would have to get the permission of the candidate to be authorized to make a statement in his support? Do we not get into freedom of speech here?
>
> Mr. TAFT. I do not believe freedom of speech would apply except to an individual.
>
> Mr. PASTORE. I am talking about a committee, a committee of faculty members say at Columbia University who might get together and buy radio time for $1,000 to broadcast their support. Would they have to get the permission of the candidate?
>
> Mr. TAFT. I suggest if the amount put on as a limitation of expenditures, as an attempt to put an overall limit on expenditures in presidential campaigns is included, if this is to have meaning, it has to have that.
>
> Mr. PASTORE. There is a distinction. Usually a political committee is formed for the purpose of directly aiding that candidate and there is no question about being authorized by that candidate. We wrote something to that effect in the other bill [FECA]. How far are we going to go without obligating independent organizations and committees furthering the promotion of a particular candidate on their own?
>
> I know what the Senator is trying to accomplish but I am wondering on this amendment whether or not we may be opening Pandora's box. There is no question about what the Senator said.

Id. at 42398. In explaining his opposition to limits on independent activities, Senator Pastore stated:

> . . . I do not want to begin to strait-jacket organizations that have a legal right, because of the character of their constitution, to proceed to express their personal opinion without permission from or obligation to the candidate they favor. I do not feel that they should have to get his permission or be subject to a fine. That is getting into pretty dangerous territory.
>
> I do not want any outsider to make a *contribution* — I do not care what the organization is — unless the person comes under it. But this goes a step further. The reason why it was

> put in the law was to recognize the fact that somewhere along the line are certain parties who have no direct contact with the candidate, but only because they like his view on issues they want to support him. They do not want to get permission to be authorized, because they are independent in that respect. On the other hand, they do not want to subject themselves to a fine.

Id. at 42399 (emphasis added). Senator Pastore further objected to any attempt to apply § 9012(f) to:

> . . . an independent, unauthorized committee that functions on its own, without any contact with the candidate himself — because the candidate has not become a party to the transaction because otherwise indirectly it is authorized — but any group acting on its own. I gave the example of the college campus group that gets together on behalf of a Republican or a Democratic candidate and they publish a pamphlet urging the candidacy of Mr. Nixon, say, at a cost of $1,500. The question is, Are they subject to a $5,000 fine? I asked that question, and the Senator from Ohio said "Yes."
>
> That is what bothers me. That is what bothers me.

Id. at 42401. Senator Pastore declared that:

> . . . anyone is entitled to think as he likes and to say what he thinks. He is not authorized by the candidate to do so. He gets together a committee because they think it is to their advantage, whether school teachers, COPE, or some other group. And they issue an article that costs $1,500. The candidate does not know what it is about. He never heard of the article, much less read it. Under this law [the Taft Amendment] this group would be subject to a $5,000 fine. It is hard for me to buy. It is close to the line.
>
> I repeat that there is a lot of substance in what the Senator is saying. However, we are dealing in a very sensitive area. I will tell the Senator, frankly, that I do not have the perfect answer.

Id.

At the conclusion of this debate, the Senate rejected the Taft Amendment. *Id.* at 42402.[20] The author of § 9012(f) had repeated

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[20] Section 9012(f) was amended during initial consideration by the Senate to apply to individuals. *See* 117 Cong. Rec. 42626 (1971). The debate on that amendment, offered by Senator Miller, indicates an intent to control only contributions by prohibiting "an individual [from] throwing his $100,000 into a campaign kitty for

opportunities to prescribe unambiguously that section's application to independent committees, but refused to do so on each such occasion. Under § 9012(f) political committees of "school teachers, COPE, or some other group," *id.* at 42401, are "entitled to act as they will" provided "the candidate knows nothing about it and there is no subterfuge," *id.* at 42626. AFC, Schmitt and Curtis are no less entitled to participate in independent expenditures than are school teachers, Columbia University faculty members, COPE or any other group.[21]

President or Vice President." *Id.* (remarks of Sen. Miller). There was no mention of prohibiting independent political activity by individuals. In the Conference Committee the reference to "individual" in § 9012(f) was deleted. H. Conf. Rep. No. 708, 92d Cong., 1st Sess., *reprinted in* [1971] *U.S. Code Cong. & Ad. News* 2078.

[21] In suggesting that this case be remanded for further discovery, Common Cause is attempting to have the district court find legislative facts, precipitated by allegedly new political developments, to support a novel construction of the statute. Congress did not contemplate such facts when it enacted § 9012(f) and never intended the provision to apply to independent expenditures by political committees such as AFC. The federal judiciary is not the proper forum to make legislative findings to support the constitutionality of a statutory provision that Congress itself believed regulated entirely different activities. If Congress perceives the existence of a new problem involving independent campaign expenditures, it can propose legislation, hold hearings, and fully debate the provisions before enacting it into law. It has not done so and Common Cause is not entitled to transfer that process wholesale to the federal judiciary.

A litigant whose activities are regulated under such a statute can challenge its constitutionality. In that context alone would a litigant be entitled to discovery to demonstrate that Congress had not provided a compelling governmental interest to support regulation of constitutionally protected activity, or a rational basis to support economic regulation. *See* Polk Co. v. Glover, 305 U.S. 5 (1938) (*per curiam*); Borden's Farm Prod. Co. v. Baldwin, 293 U.S. 194 (1934).

3. The FEC historically has construed 26 U.S.C. § 9012(f) to limit coordinated expenditures, not independent expenditures.

This case is the first time that the FEC has asserted that § 9012(f) limits independent expenditures by political committees. Despite numerous hearings and requests for comments on regulations governing independent expenditures and the Fund Act during the FEC's six years of existence, the FEC conspicuously failed to promulgate any rule limiting such independent expenditures.[22] While the FEC has specifically prohibited independent expenditures by certain committees, national banks, corporations and labor organizations, the FEC never limited independent expenditures by unauthorized political committees in support of presidential candidates. *See* 11 C.F.R. §§ 109.1(b)(1), (e) & 110.7(a)(5), (b)(4) (1981).

In 1976 the FEC proposed a regulation that largely tracked the language of § 9012(f). *See* 41 Fed. Reg. 26,399 (1976). On July 7, 1976 the FEC conducted extensive hearings at which time § 9012(f) and the proposed regulation were the principal topics of discussion. *See Hearings on Part 140 (General Election Financing) Before the Federal Election Commission* (July 7, 1976). On that occasion, two Commissioners and the FEC General Counsel volunteered that the statute could not be applied to independent expenditures by political committees in light of *Buckley*. *Id.* at 21-22, 36-40 (remarks of Commissioner Thomas E. Harris, and colloquy between Commissioner William Springer and FEC General Counsel John G. Murphy, respectively).

None of the witnesses or Commissioners suggested that § 9012(f) should be construed to limit independent expenditures. To

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[22] *See Hearings on Part 109 (Independent Expenditures) and Part 110 (Contribution and Expenditure Limitations and Prohibitions) Before the Federal Election Commission* (June 9, 1976); *Hearings on Part 140 (General Election Financing) Before the Federal Election Commission* (July 7, 1976); *Hearings on Proposed Rules on Public Financing of Presidential Election Campaigns Before the Federal Election Commission* (June 20, 1978); 41 Fed. Reg. 21,572 (1976); 42 Fed. Reg. 55,622 (1977); 43 Fed. Reg. 23,587 (1978); 45 Fed. Reg. 32,003 (1980); *id.* at 43,371.

the contrary, discussion focused on whether the "right" to make *coordinated* expenditures up to the $1,000 limit should be extended to local and county political committees of the two major parties. *See id.* at 23-56 (remarks of General Counsel of Republican National Committee); *id.* at 72-78, 84-93 (remarks of General Counsel and Deputy General Counsel of Jimmy Carter for President Committee); *id.* at 122-23 (remarks of Counsel of Democratic National Committee).

As a result of this hearing, the FEC replaced the proposed regulation with a provision that dealt exclusively with limits on coordinated expenditures by political party committees in connection with a presidential general election. 11 C.F.R. § 146.1 (1980) (repealed 1980). In addition, § 9012(f) was the basis used by the FEC to permit coordinated expenditures by local party committees up to $1,000 on behalf of the presidential ticket.[23]

Rather than utilizing § 9012(f) as a limitation on independent expenditures, the FEC used that statute as justification for permitting *coordinated* expenditures up to $1,000 by party committees. The FEC regulations based on § 9012(f), which by statute must be submitted to each house of Congress subject to a legislative veto prior to promulgation, *see* 2 U.S.C. § 438(d); 26 U.S.C. § 9009(c), amply demonstrate that the FEC, like Congress, did not construe or intend that § 9012(f) limit independent expenditures. *See Lorillard* v. *Pons,* 434 U.S. 575, 580-81 (1978); *Chemehuevi Tribe of Indians* v. *Federal Power Commission,* 420 U.S. 395, 408-10 (1975); *Commissioner of Internal Revenue* v. *Noel's Estate,* 380 U.S. 678, 681-82 (1965).

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[23] *See* 11 C.F.R. § 110.7(b)(5)(1979) (repealed 1980). "This provision is derived from 26 U.S.C. § 9012(f)." H.R. Doc. No. 573, 94th Cong., 2d Sess. 68 (1976) (FEC "Justification and Explanation" for § 110.7(b)(5)), *reprinted in* Fed. Elec. Camp. Fin. Guide (CCH) ¶ 864, at 1561-3 (1980). The most recent FEC regulations omit § 110.7(b)(5), because the 1979 amendments to the election laws now enable local party committees to make certain unlimited coordinated expenditures on behalf of their presidential nominee in connection with voter registration and get-out-the-vote activity and certain campaign materials. *See* 2 U.S.C. § 431(9)(B)(iv), (viii), (ix).

II. IF CONSTRUED TO LIMIT INDEPENDENT EXPENDITURES, 26 U.S.C. § 9012(f) IS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT.

A. *Buckley* Held That Limits On Independent Expenditures Such As 26 U.S.C. § 9012(f) Violate The First Amendment.

The three-judge court construed § 9012(f) to prohibit independent expenditures over $1,000 by political committees. So construed, the three-judge court properly found § 9012(f) facially unconstitutional.

1. Limits on independent expenditures restrain freedom of political expression and association.

Limitations on independent expenditures infringe freedoms of expression and association that are afforded maximum protection by the First Amendment. *Buckley, supra,* 424 U.S. at 14-15. *Buckley* recognized that " 'there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates.' " *Id.* at 14 (quoting *Mills* v. *Alabama,* 384 U.S. 214, 218 (1966)); *Bellotti, supra,* 435 U.S. at 776-77. By giving the broadest protection to political expression, the First Amendment nurtures a republic where the people are sovereign. "[T]he ability of the citizenry to make informed choices among candidates" who will upon election inevitably "shape the course which we follow as a nation" is "essential." *Buckley, supra,* 424 U.S. at 14-15.[24] Freedom of speech has its " 'most urgent application precisely to the conduct of campaigns for political office.' " *Id.* at 15 (quoting *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272 (1971)).

Freedom of association receives no less First Amendment protection than freedom of expression. Group association enhances effective advocacy of public and private points of view, particularly controversial ones. *Buckley, supra,* 424 U.S. at 15.

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[24] *Accord,* Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government").

The Court in *Buckley* acknowledged that the First Amendment guarantees " 'freedom to associate with others for the common advancement of political beliefs and ideas.' " *Id.* (quoting *Kusper* v. *Pontikes,* 414 U.S. 51, 56 (1973)). Such freedom encompasses the freedom to associate with the political party or organization of one's choice. *Buckley, supra,* 424 U.S. at 15.[25] *Buckley* establishes that the First Amendment gives maximum protection to a political committee that advocates its views on candidates and campaign issues.

2. Limits on independent expenditures impermissibly restrict the quantity of political expression.

The three-judge court found that § 9012(f) makes it a crime for independent political committees to spend in excess of $1,000 for communications in support of presidential candidates who receive public funding. *FEC* v. *AFC* at 27a. So construed, § 9012(f) differs little from the expenditure limitation of former 18 U.S.C. § 608(e)(1), which *Buckley* found could not withstand strict First Amendment scrutiny. Section 608(e)(1) made it a crime for individuals or groups to make expenditures in excess of $1,000 "relative to a clearly identified candidate." *Buckley, supra,* 424 U.S. at 39. Section 9012(f) imposes the same restriction on expenditures by independent political committees relative to presidential candidates.

Buckley found that a limitation on the amount that "a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression." *Id.* at 19. "[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money." *Id.* The Court recognized that the increasing importance of television, radio and other mass media for news and information make these expensive modes of communication indispensable to effective political speech. *Id.*[26]

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[25] *See* Cousins v. Wigoda, 419 U.S. 477, 487-88 (1975).

[26] For example, in 1975 one full-page advertisement in a daily metropolitan newspaper cost $6,971.04. Buckley, *supra,* 424 U.S.

The $1,000 ceiling of § 9012(f) prevents political committees, including AFC, from communicating their viewpoints to the public.[27] During the 1980 presidential campaign, AFC spent in excess of $1,000 to purchase advertisements, which advocated the election of Ronald Reagan and expressed AFC's views on campaign issues, in major metropolitan newspapers and on radio stations around the country. *See* Appendices A & B *infra*. AFC also published and distributed letters, brochures, fliers, buttons and bumper strips in support of Ronald Reagan.

Prohibiting activities such as AFC's reduces the quantity of political expression during a presidential campaign by "restricting the number of issues discussed, the depth of their exploration and the size of the audience reached." *Buckley, supra*, 424 U.S. at 19. Restraints on the quantity of political expression, including that which advocates the election or defeat of presidential candidates, violate the First Amendment. *Id.* at 47-51 (citing *Mills, supra*, 384 U.S. at 218-20; *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 257 (1974)).

In *Mills* the Court struck down as an unconstitutional restraint on political expression a state law making it a crime for editors of a daily newspaper to publish an editorial on election day urging people to vote for a particular candidate. 384 U.S. at 220. *Tornillo* declared unconstitutional a law that required a newspaper to make space available to candidates to reply to its criticism. 418 U.S. at 258. In *Buckley* the Court found expenditure limitations to be a much more severe restraint on expression. 424 U.S. at 47-51. Section 9012(f) prohibits political committees from engaging in independent expression throughout a presidential campaign and restricts the overall quantity of

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at 20 n.20. If anything, today these modes of communication are even more indispensable and even more expensive. *See* Editor & Publisher, Sept. 1, 1979, at 12N (full page advertisement in *Washington Post* cost $13,626.90 in 1979).

[27] As did § 608(e)(1), § 9012(f) makes it a criminal offense for an association to place a single quarter-page advertisement relative to a publicly funded presidential candidate in a major metropolitan newspaper. Buckley, *supra*, 424 U.S. at 40.

political expression. The unconstitutional restraints of *Mills* and *Tornillo* pale in comparison. [28]

Limitations on the quantity of political expression are no less unconstitutional when the speaker is a political committee. *FEC* v. *AFC* at 24a. *Buckley* found unconstitutional " 'substantial and direct restrictions on the ability of candidates, citizens *and associations* to engage in protected political expression.' " *Id.* at 21a (quoting *Buckley, supra,* 424 U.S. at 58-59) (emphasis supplied by court). This Court has subsequently made clear that the First Amendment protects not only the speaker but also "public access to discussion, debate, and the dissemination of information and ideas." *Bellotti, supra,* 435 U.S. at 783. "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, *association,* union or individual." *Id.* at 777 (emphasis added). Accordingly, the First Amendment prohibits the government from "dictating subjects about which persons may speak *and the speakers* who may address a public issue." *Id.* at 785 (citing *Police Department* v. *Mosley,* 408 U.S. 92, 96 (1972)) (emphasis added).

That AFC is well-organized does not distinguish its political expression from that of any other individual, group, or association. *FEC* v. *AFC* at 17a. Whether a wealthy individual, an informal small group or a political committee pays for a public communication, the expression is of equal inherent worth and exposes the public to debate on public issues that is " 'uninhibited, robust and wide open.' " *Id.* at 23a (quoting *New York Times Co.,*

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[28] Section 9012(f) is analogous to Title I of FECA which was held unconstitutional as a prior restraint. *See* ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom.* Staats v. ACLU, 422 U.S. 1030 (1975). By providing public funds to the candidate, the government can proscribe independent communications concerning the candidate by political committees. Moreover, the candidate, by choosing to accept public funds, can effectively silence all independent communications by political committees in support of the candidate.

supra, 376 U.S. at 270). [29] Section 9012(f) as construed by appellants impermissibly restricts the quantity of AFC's political expression on the basis of the speaker's identity.

The fact that § 9012(f) is part of a public financing scheme does not save it from constitutional infirmity under *Buckley*. *See Republican National Committee, supra,* 487 F. Supp. at 286; *FEC* v. *AFC* at 14a-15a. In *Republican National Committee,* this Court reviewed the constitutionality of the Fund Act's prohibition of contributions to publicly funded candidates. This prohibition is constitutional only because it in no way abrogates the right independently to express support for the candidate. 487 F. Supp. at 285-87. *Republican National Committee* found it "[m]ost important" that "uncoordinated expenditures are permitted without limit. Limitations on uncoordinated expenditures were held unconstitutional in *Buckley* v. *Valeo.*" *Id.* at 286. The candidate's choice to fund the campaign with public money does not alter the First Amendment right of the candidate's supporters, be they individuals, groups or political committees, to make unlimited independent expenditures.

3. Limits on independent expenditures impermissibly restrict the quality of political expression.

An independent expenditure limitation is also unconstitutional under *Buckley* as an impermissible interference with the *quality* of political expression. *Buckley, supra,* 424 U.S. at 22.

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[29] *See* United States v. Congress of Indus. Organizations, 335 U.S. 106, 144 (1948) (Rutledge, J., concurring):

> There is therefore an effect in restricting expenditures for the publicizing of political views not inherently present in restricting other types of expenditure, namely, that it necessarily deprives the electorate, the persons entitled to hear, as well as the author of the utterance, whether an individual or a group, of the advantage of free and full discussion and of the right of free assembly for that purpose.
>
> The most complete exercise of those rights is essential to the full, fair and untrammeled operation of the electoral process. To the extent they are curtailed the electorate is deprived of information, knowledge and opinion vital to its function.

Buckley recognized the interrelation of speech and association, particularly in the political context. *Id.* at 15-17. Emphasizing the importance of association to the advancement of political beliefs and ideas, *Buckley* relied on a long line of cases establishing an individual's First Amendment right to effective political expression through effective political organization. *Id.* at 15.[30] This associational right "is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally effective." *Id.* at 65-66.

Buckley held that § 608(e)(1), which limited independent expenditures by individuals or groups, precluded "most associations" from amplifying the voice of their adherents, the original basis for First Amendment protection for the freedom of association. *Id.* at 22. Restraints on "the ability of independent associations . . . to expend resources on political expression" simultaneously interferes with " 'the freedom of [their] adherents.' " *Id.* at 23 (quoting *Sweezy, supra,* 354 U.S. at 250).

Section 9012(f), like § 608(e)(1), impermissibly restrains the quality of AFC's political expression. AFC is a "pooling agent" for many small contributors who wish to engage in effective political advocacy. *FEC* v. *AFC* at 15a.[31] The money contributed purchased "political communications" that "speak the language" of AFC's contributors, since the contributions are bas-

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[30] *See, e.g.,* Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973); NAACP v. Alabama, 357 U.S. 449, 460-63 (1958); Sweezy v. New Hampshire, 354 U.S. 234, 250-51 (1957); Cousins v. Wigoda, 419 U.S. 477, 487-88 (1975); *accord,* Griswold v. Connecticut, 381 U.S. 479, 483 (1965); Democratic Party v. La Follette, 49 U.S.L.W. 4178, 4182-83 (U.S. Feb. 25, 1981) (No. 79-1631).

[31] The majority of the individual contributions received by AFC were less than $200. The FEC's assertion that AFC did not represent small contributors because its contributions averaged $750 is disingenuous. First, $750 is well below the $5,000 contribution limit that Congress deemed appropriate. *See* 2 U.S.C. § 441a(a)(1)(C). Second, the FEC's "average" is computed using only those contributions that AFC itemized in its reports. Only contributions in excess of $200 must be itemized. *Id.* § 434(b)(3). The FEC's "average" ignores all unitemized contributions of less than $200.

ed on a shared political understanding and political interest. *Id.* at 15a-18a.[32]

With the increasing dependence of the electorate on mass media for information and news, *see Buckley, supra,* 424 U.S. at 19, formally structured organizations that use professional services in preparing and disseminating political messages are essential to effective political expression by all but the very wealthy. *FEC* v. *AFC* at 17a - 19a. Most individuals and many small groups could not afford such expenditures because of the high cost of time or space in widely circulated or viewed media. *See* note 26 *supra.* Political committees like AFC, which was organized by 100 individuals, by necessity require central management to organize and focus the views of their many participants. The effect of the message depends not only on the size of the audience reached, but also on the manner in which the message is communicated.[33] The use of professionals by political committees and individuals to prepare, package and place communications enhances the effectiveness of the message. *FEC* v. *AFC* at 16a-19a. Economies of scale available to large centrally managed committees further enhance the effectiveness of speech. *Id.* at 16a.[34] Due to the high cost and expertise required for effective political expression, denial of the right to join together in large centrally managed groups for the purpose of expressing views on presidential candidates would silence those individuals without wealth and media expertise.[35]

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[32] Many of AFC's requests for contributions included examples of the advertisement AFC had already purchased or hoped to purchase with the contributions. *See* Appendix C *infra.*

[33] *See* Cohen v. California, 403 U.S. 15, 25-26 (1971); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 514 (1969).

[34] As the three-judge court recognized, 1000 politically motivated persons could each probably afford to purchase one classified advertisement in a major newspaper, but by joining together, pooling funds and integrating planning and preparation, they could purchase an advertisement in a national magazine or on television. FEC v. AFC at 16a.

[35] Since $1,000 would not even purchase a quarter-page advertisement in a major newspaper, § 9012(f) negates the associational ad-

4. Under *Buckley*, 26 U.S.C. § 9012(f) constitutes a limitation on expenditures, not contributions.

Section 9012(f) impinges on the constitutional freedoms of association and expression far more severely than the contribution limitations upheld in *Buckley*. The contribution provisions before the Court in *Buckley* limited the amount of money that individuals or groups could give to candidates and their authorized campaign committees. *See* 424 U.S. at 23-24. Section 9012(f) does not limit contributions to or fundraising by political committees, but limits the amount that an unauthorized political committee may spend independently of the candidate or his campaign.

Buckley found that limits on contributions to a candidate restrict the freedom of contributors to voice the intensity of their support for the candidate through the size of their contributions, but permit undifferentiated "symbolic expression of support" without infringing "the contributors' freedom to discuss candidates and issues." *Id.* at 22.[36] Contribution limitations infringe a supporter's freedom to associate with the candidate, but "leave the contributor free to become a member of any political association." *Id.* at 22-23; *accord, California Medical Association, supra,* 49 U.S.L.W. at 4846 (plurality opinion of Marshall, J.).

AFC is an independent political committee, a group of individuals who have joined together in order to amplify their views.

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vantage of pooling funds. As such, § 9012(f) goes beyond "chilling" the decision to associate that arises from disclosure requirements, Buckley, *supra,* 424 U.S. at 66-67, and directly restrains not only the quantity of associational speech, but the quality of speech attained through group association.

[36] *Buckley* found no indication that candidate and campaign contribution limits would have an adverse effect on campaign funding. 424 U.S. at 21-23. At most the candidate would be forced to raise funds from a broader base of constituents, but there would be no reduction in the total amount of money available to promote political expression. *Id.* Section 9012(f) is not nearly so benign. By preventing the pooling of resources to purchase effective advocacy, it discourages spending for independent political expression and severely restricts the amount available for political debate in presidential campaigns.

Section 9012(f) constitutes more than a marginal interference with AFC's ability to express support for a candidate. It is a direct and substantial restraint on the ability of AFC to engage in effective political expression. *Id.*; *FEC* v. *AFC* at 19a - 24a.[37] AFC's expenditures, which were made independently of President Reagan and his campaign, are precisely the "type of expenditures that the court in *Buckley* considered constitutionally protected." *California Medical Association, supra,* 49 U.S.L.W. at 4846 (plurality opinion of Marshall, J.); *accord, id.* at 4848 (Blackmun, J., concurring in judgment).

As defined by the federal election laws and applied by the FEC, the term political committee encompasses *any* group that undertakes political activities in support of a presidential candidate.[38] As construed by the three-judge court, § 9012(f) pro-

[37] *See* T. Emerson, The System of Freedom of Expression 432 (1970):

> [I]t is clear from the functions served by association in a democratic society that associational expression should be entitled to the same complete protection as individual expression. Organization primarily supplies the mechanism for reaching a wider audience. It does not change the character of expression as the communication of beliefs, opinions, information and ideas, or its content. Thus associational expression is simply an extension of the individual right of expression and, for the same reasons and to the same extent, should be free of governmental abridgment.

[38] The FEC has unequivocally stated that "for the purposes of 26 U.S.C. 9012(f), the term 'political committee,' " is "*any* committee, *club, association* or other *group* of persons which receives contributions . . . *or makes expenditures* aggregating in excess of $1,000 during a calendar year." 11 C.F.R. § 9002.9 (1981) (referring to 11 C.F.R. § 100.5 (1981)) (emphasis added). The FEC has never promulgated a regulation or issued an advisory opinion that permits individuals to act in concert to influence an election and spend over $1,000 without becoming a "political committee."

Common Cause argues that § 9012(f) "imposes no restriction on the freedom of two or more individuals, pooling and using their own money, to engage jointly in personal expression to support their preferred candidate." Brief of Appellant Common Cause, at 35; *accord,* Brief of Appellant FEC, at 45 n.66. The FEC, however,

hibits any form of association for the purpose of expressing political views in support of a presidential candidate. Notwithstanding the broad scope of the statute, appellants argue that it is no more restrictive than the contribution limitations in *Buckley* because it prohibits only "centrally managed mass funds" but leaves everyone free to spend without limits for "personal speech." Brief of Appellant Common Cause, at 20-21; *see* Brief of Appellant FEC, at 41-50. For all practical purposes, appellants argue that First Amendment protection is forfeited when political expression becomes effective. The First Amendment protects both the *quantity* and *quality* of political expression.[39] These rights may not be denied to "groupings of like-minded individuals" merely because they are "efficient." *FEC* v. *AFC* at 16a.

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has always maintained that such a group would constitute a "political committee" whenever it raises contributions or makes expenditures in excess of $1,000 "for the purpose of influencing an election." FEC Advisory Opinion 1980-106, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5582 (Dec. 23, 1980) (a "loose association" that publishes a summary of positions by candidates Reagan, Carter and Anderson concerning "Key Moral and Religious Liberty Issues" is a political committee if more that $1,000 is spent for publication and distribution); FEC Advisory Opinion 1980-126, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5577 (Dec. 22, 1980)(a single individual who solicited contributions and used them to print and distribute pamphlets urging people to vote for Republicans was acting as a "political commitee"); FEC Advisory Opinion 1976-51, Fec. Elec. Camp. Fin. Guide (CCH) ¶ 5215 (Sept. 2, 1976) (an informal discussion group of individuals who do not pool funds but make personal contributions to candidates are a political committee because they are "acting in concert").

[39] The First Amendment rights of speech and assembly are not ends in themselves, but "means to effect change through the political process." Ripon Soc'y v. National Republican Party, 525 F.2d 567, 585 (D.C. Cir.) (*en banc*), *cert. denied*, 424 U.S. 933 (1976). The First Amendment protects the right not only to form political associations, "but to organize and direct them in the way that will make them most effective." *Id.* The right to associate is meaningless if an organization is prohibited from effectively advocating the political change sought by its adherents. *Id.*; *accord*, Buckley, *supra*, 424 U.S. at 22-23; Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

B. *Buckley* Held That Limits On Independent Expenditures Such As 26 U.S.C. § 9012(f) Fail To Serve Narrowly Any Compelling Governmental Interest That Cannot Be Accommodated By Alternative Measures Less Restrictive Of First Amendment Rights.

A limitation on independent expenditures such as § 9012(f) is a direct restraint on political expression and association protected by the First Amendment. To be constitutionally permissible, § 9012(f) must: (1) serve a compelling governmental interest; (2) do so narrowly; and (3) constitute the legislative alternative least restrictive of First Amendment rights. *See Buckley, supra,* 424 U.S. at 45-51; *Bellotti, supra,* 435 U.S. at 786; *FEC* v. *AFC* at 10a-13a. *Buckley* held that a limitation on independent expenditures such as § 9012(f) cannot satisfy this "exacting scrutiny" and is unconstitutional. 424 U.S. at 44-45; *California Medical Association, supra,* 49 U.S.L.W. at 4848 (Blackmun, J., concurring in judgment); *FEC* v. *AFC* at 10a-13a.

1. The only governmental interest sufficiently compelling to justify restrictions on political expression and association during an election campaign is the prevention of corruption or the appearance of corruption.

In *Buckley,* this Court held that the only governmental interest sufficiently compelling to support restrictions on First Amendment rights of political expression and association is "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." 424 U.S. at 25; *see California Medical Association, supra,* 49 U.S.L.W. at 4846 (plurality opinion of Marshall,J.); *FEC* v. *AFC* at 11a.[40] *Buckley* recognized that the 1974

[40] *Buckley* held that contributions and expenditures during election campaigns may not be limited in order "to mute the voices of affluent persons and groups in the election process" or to "act as a brake on the skyrocketing cost of political campaigns." 424 U.S. at 25-26. The Court concluded that both asserted governmental interests are inconsistent with the First Amendment. *See id.* at 48-49

amendments to FECA were designed to prevent the corrupt use of campaign contributions in return for candidate promises. *Buckley, supra,* 424 U.S. at 27; *accord, California Medical Association, supra,* 49 U.S.L.W. at 4846-47 (plurality opinion of Marshall, J.). The Court noted that Congress was reacting to specific abuses that surfaced in the aftermath of the 1972 presidential election: (1) contributions to candidates by the dairy industry in exchange for increases in governmentally imposed milk price supports ; (2) contributions to candidates by large corporations following threats of unfavorable governmental treatment made by campaign fundraisers; and (3) contributions to candidates by ambassadors and would-be ambassadors as a condition of their appointments.[41] As the court of appeals in *Buckley* found, "[t]he record before Congress was replete with specific examples of improper attempts to obtain governmental favor in return for large campaign contributions." *Buckley* v. *Valeo,* 519 F.2d 821, 839 n.37 (D.C. Cir. 1975) *(en banc), rev'd in part,* 424 U.S. 1 (1976). This Court concurred in Congress's conclusion that "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the in-

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("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"); *id.* at 49 n.55 ("Democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues.")

The FEC asserts that the opinion below "disregards" § 9012(f)'s alleged function of preventing " 'splintered parties and unrestrained factionalism [that might] do significant damage to the fabric of government.' " Brief of Appellant FEC, at 38 (quoting Storer v. Brown, 415 U.S. 724, 736 (1974)). The FEC does not specify how independent expenditures on behalf of the Republican and Democratic Party nominees for President, the only expenditures realistically limited under § 9012(f), will lead to the development of "splintered parties and unrestrained factionalism."

[41] The Court pointed to the instances of corruption noted by the court of appeals. Buckley, *supra,* 424 U.S. at 27 & n.28 (citing Buckley v. Valeo, 519 F.2d 821, 839-40 nn. 36-38 (D.C. Cir. 1975) (*en banc*)).

tegrity of our system of representative democracy is undermined." *Buckley, supra,* 424 U.S. at 26-27[42]

Buckley noted that not all campaign contributions are accompanied by explicit or even tacit agreement that a successful candidate will bestow special favor upon the contributor. *Id.* at 26-27. The Court recognized that the abuses of the 1972 campaign had seriously impaired the citizen's confidence in government, leaving a skeptical public with the fear that many, if not all, large contributions are the result of an illicit *quid pro quo* arrangement between contributor and candidate. *Id.* at 27. The "appearance of corruption" inherent in the act of making a campaign contribution to a candidate, the Court held, is a compelling reason to limit the size of all contributions to candidates. *Id.* at 27-29.

2. Limits on independent expenditures such as 26 U.S.C. § 9012(f) fail to serve narrowly the compelling governmental interest in stemming real or apparent corruption.

A contribution limitation is narrowly drawn and "focuses precisely on the problem of large campaign contributors -- the narrow aspect of political association where the actuality and potential for corruption have been identified." *Id.* at 28. It constitutes the alternative least restrictive of First Amendment rights since neither disclosure requirements nor federal bribery and gratuity laws[43] have proved an effective deterrent of the corrupt exchange of money for governmental action, *id.* at 27-28, and

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[42] *Accord,* FEC v. AFC at 11a; California Medical Ass'n v. FEC, 641 F.2d 619, 645 (9th Cir. 1980) (Wallace, J., concurring and dissenting), *aff'd,* 49 U.S.L.W. 4842 (U.S. June 26, 1981) (No. 79-1952) ("The expression which Congress hoped to curb by the contribution regulations is, roughly: 'Here is $100,000. Now I have your vote in my pocket.' ")

[43] *See* 18 U.S.C. §§ 201(c), (g) (1976). Agreements prohibited by the bribery and gratuity statutes are the precise *quid pro quo* arrangements that undergird FECA. Note, *Campaign Contributions and Federal Bribery Law,* 92 Harv. L. Rev. 451, 458 (1978); *see, e.g.,* United States v. Brewster, 506 F.2d 62, 77-78 (D.C. Cir. 1974) ("Senator Brewster received sums of money from Anderson, not out of general support based on his past record or insubstantial

contribution limitations do not impede the ability of individuals or groups to engage in unlimited expression during an election campaign, *id.* at 28-29; *accord, Republican National Committee, supra,* 487 F. Supp. at 286; *FEC* v. *AFC* at 12a-13a.

In contrast to its recognition of a compelling need to eliminate "the corrupting potential of large financial contributions to candidates," *Buckley, supra,* 424 U.S. at 36, *Buckley* held that "the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify . . . [a] ceiling on independent expenditures," *id.* at 45. Nevertheless, appellants assert that independent expenditures by political committees such as AFC are "corrupt" because a candidate may become "beholden" to a group that independently advocates the candidate's election. *See* Brief of Appellant FEC, at 23-27; Brief of Appellant Common Cause, at 27-29. Yet, by definition, an "independent expenditure" is made in the absence of any prior consultation or other prearrangement with a candidate or the candidate's campaign. *FEC* v. *AFC* at 6a; *see* 2 U.S.C. § 441a(a)(7)(B)(i). As Senator Pastore made clear when FECA and the Fund Act were first enacted, Congress intended to prevent the situation in which "one makes a personal contribution to an individual [and] there is the intimate contact of the person to [the] person. That is where we are disturbed a little, because *that is where you become beholden.*"[44]

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hopes for the future, but in well-founded consideration for his forthcoming official action on specific proposed or pending postal rate legislation.")

[44] 117 Cong. Rec. 29303 (1971) (remarks of Sen. Pastore) (emphasis added). The legislative history of § 9012(f) indicates that Congress intended it to serve as a contribution limitation. *See* Part I *supra.* The evil that Congress sought to eradicate arose solely in the context of contributions to candidates in exchange for special treatment. *See, e.g., id.* at 41774 (remarks of Sen. Long concerning Fund Act)("I have seen people make commitments that they did not want to make and start out determined that they were not going to make any and find themselves head over heels in debt and making commitments they had no intention of making."); *id.* at 42595 (remarks of Sen. Cannon concerning Fund Act) ("Take France, as an example. The present ambassador contributed $54,000 in 1968. I am sure his name just happened to be taken from a hat.")

Absent prearrangement between citizen and candidate, there is no opportunity for the latter to agree, either expressly or tacitly, to perform an official act in exchange for the concededly independent expenditure. *See FEC* v. *AFC* at 19a. Likewise, there can be no "appearance of corruption," because the lack of prior consultation with the candidate or his campaign "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate" and eliminates even the appearance that a corrupt agreement has been struck. *Buckley, supra,* 424 U.S. at 47.[43]

An independent expenditure poses no threat of real or apparent corruption. *Id.* at 47; *California Medical Association, supra,* 49 U.S.L.W. at 4848 (Blackmun, J., concurring in judgment); *FEC* v. *AFC* at 12a. *Buckley* rejected the claim that a limitation on independent expenditures is necessary to prevent circumvention of the contribution ceilings by those who would covertly enter illegal agreements with candidates and disguise the resultant expenditures on the candidate's behalf as "indepen-

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[43] *See* Note, *The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments,* 86 Yale L.J. 953, 964 (1977) ("The lack of a visible associational link vitiates the appearance of corruption.")

Buckley pointed out that "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." 424 U.S. at 47. There is considerable evidence that this has often been the case. *See* Wash. Post, Apr. 28, 1981, at A3, col. 3 (Republican National Committee Chairman asserts independent expenditures "create all kinds of mischief"); Wash. Post, June 29, 1980, at A6, col. 1 (Reagan campaign chairman expresses "fear" that independent expenditures are "unguided missiles" and often "backfire in your face"); Wash. Star, June 12, 1980, at A3, col. 2 (Reagan campaign official suggests that independent expenditure committees are " 'loose cannons' " that cause candidates "more trouble than help").

Rather than securing the certainty of special treatment from the candidate in consideration for a large contribution, the person or group making independent expenditures runs the risk that the expenditures will instead earn the candidate's disfavor.

dent." *Id.* at 44-45; *FEC* v. *AFC* at 11a.[46] A "loophole closing" provision such as § 9012(f) is broadly overinclusive. It brings within its sweep legitimate independent expenditures that cannot be "disguised" contributions because of the absence of prior consultation with the candidate or the candidate's campaign and therefore can raise no appearance of corruption.[47]

If a "disguised" contribution were possible, a limitation on independent expenditures such as § 9012(f) would be underinclusive, since it does not reach the numerous situations in which contribution limitations might similarly be circumvented. Section 9012(f) does not apply to wealthy individuals, any of whom could "lawfully dedicate his entire fortune" in exchange for special treatment by a candidate. *FEC* v. *AFC* at 22a. As construed by appellants, § 9012(f) does not apply to independent expenditures by "informal" groups, even though such groups are capable of evading contribution limitations as well.[48] Assuming § 9012(f) is construed narrowly to apply only to expenditures that

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[46] AFC can make only *independent* expenditures with respect to publicly funded presidential elections. *See* 26 U.S.C. §§ 9003(b)(2); 9012(b). AFC was prohibited from making *any* contributions to publicly funded presidential candidates, *see* 26 U.S.C. § 9003(b)(2); 2 U.S.C. § 441a(a)(1) (limiting contributions to federal candidates other than publicly funded presidential candidates by all "persons," including political committees that are not "multicandidate" committees, to $1,000 per year). AFC's contributors cannot evade the Fund Act's prohibition of direct contributions to presidential candidates by "channelling funds" through AFC. *See* California Medical Ass'n, *supra*, 49 U.S.L.W. at 4847 (plurality opinion of Marshall, J.).

[47] *See* Buckley, *supra*, 424 U.S. at 44 (independent expenditure limitations "cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations"); Note, *supra* note 45, at 972 n.97.

[48] *See* note 38 *supra*.

expressly advocate a candidate's election or defeat,[49] it will not apply to independent expenditures discussing "issues" that do not explicitly mention the candidate, no matter how closely they track the candidate's platform.[50] As *Buckley* concluded, "no substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office." 424 U.S. at 45.[51]

Section 9012(f), like the independent expenditure limitation struck down in *Buckley,* is unconstitutional because it is not narrowly tailored to serve the compelling governmental interest in stemming real or apparent corruption. That § 9012(f) is contained in the Fund Act rather than in FECA does not alter this result. The

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[49] *Buckley* held that "to preserve the provision against invalidation on vagueness grounds, § 608(e)(1)," which on its face limited all expenditures "for the purpose of influencing" an election, "must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate." 424 U.S. at 44; *accord,* FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 52-53 (2d Cir. 1980)(*en banc*); United States v. National Comm. for Impeachment, 469 F.2d 1135, 1141 (2d Cir. 1972); FEC v. AFSCME, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9078 (D.D.C. 1979). Absent such a limiting construction, § 9012(f) suffers from similar unconstitutional vagueness.

[50] If the Court were to construe § 9012(f) as it construed § 608(e), the full-page AFC advertisement reprinted in Appendix A *infra* would not violate § 9012(f) if the words of express advocacy were deleted. *See* Buckley, *supra,* 424 U.S. at 40; FEC v. Central Long Island Tax Reform Immediately Comm., 612 F.2d 45, 52-53 (2d Cir. 1980)(*en banc*).

[51] Section 9012(f) is further underinclusive because it does not apply to independent expenditures on behalf of candidates who decline to accept, or are not eligible for, public financing. These candidates, who do not have access to public funds and must solicit contributions, would presumably have a greater incentive to circumvent the contribution limitations contained in FECA by encouraging contributions disguised as independent expenditures in exchange for special treatment.

Fund Act prevents presidential candidates who opt for public financing from accepting *any* contributions in the general election campaign. *See* 26 U.S.C. § 9003(b)(2). This prohibition is a more stringent safeguard than the contribution limitation upheld in *Buckley* and narrowly serves the identical function of preventing corrupt agreements or the appearance of corrupt agreements between contributors and presidential candidates.[52] Any expenditure made in consultation with a candidate or the candidate's campaign constitutes a contribution and is prohibited. *See* 2 U.S.C. § 441a(a)(7)(B)(i). Section 9012(f) is unrelated to the governmental interest in preventing potentially corrupt *quid pro quo* arrangements. In holding that a limitation on independent expenditures such as § 9012(f) is unconstitutional, the Court in *Buckley* correctly noted that "the value of public financing is not dependent on the existence of a generally applicable expenditure limit." *Id.* at 109.[53]

Section 9012(f) is not saved from constitutional infirmity because it limits independent expenditures by "political committees." So long as expenditures by political committees are not the result of prearrangement with the candidate or the candidate's campaign, there is no possibility that the expenditures are made in exchange for a promise of special favor.[54] Contrary to the view of

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[52] *See* Buckley, *supra*, 424 U.S. at 96; Republican Nat'l Comm. v. FEC, 487 F. Supp. 280, 285-86 (S.D.N.Y. 1980) (three-judge court), *aff'd*, 445 U.S. 955 (1980). Public funding also permits the candidate to concentrate on advocating his election before the public and relieves him from the time and effort otherwise devoted to fundraising. *See* 424 U.S. at 96; 487 F. Supp. at 284-85. Section 9012(f) does not further this governmental interest.

[53] *Accord*, S. Rep. No. 689, 93d Cong., 2d Sess. 18 (1974), *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 114 (1977) ("*the need to control* [independent expenditures] *does not arise from public financing.*") (emphasis in original).

[54] Contrary to appellants' assertion, this Court has not found fault with "aggregated funds" as an improper influence on political decisions. The Court has held that unlimited independent expenditures by unions and corporations raise no problem of corruption or the appearance of corruption so long as the expenditures are

democracy espoused by Common Cause and the FEC, no problem of corruption is created when a political committee (or any person) earns some measure of loyalty from a candidate because it effectively advocates the candidate's election.[55] Any resulting loyalty constitutes no more than salutary responsiveness to a political constituency — the core of our system of representative government.[56]

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made from separate segregated funds. *See* Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 414-18 (1972); United States v. Congress of Indus. Organizations, 335 U.S. 106, 123-24 (1948). The governmental interest underlying statutory authorization for the creation of separate segregated funds does not concern corruption of candidates, but rather ensures that the individual union member or shareholder retains "his freedom to refuse support," 407 U.S. at 415, so that the union or corporation is prevented from corruptly representing an exaggerated level of support based on involuntary or coerced contributions. *See* Bellotti, *supra,* 435 U.S. at 787, 792-95. *Bellotti* rejected the notion that political expression by aggregated funds is itself an evil that can be regulated under the First Amendment. Political associations are free to "aggregate large sums of money to promote effective advocacy." Buckley, *supra,* 424 U.S. at 22.

[55] Appellants' desire to limit independent expenditures because of their effect on the successful candidate is based solely on the content and effectiveness of the expression so limited. As this Court made clear in *Buckley,* when "the interest in regulating the alleged 'conduct' of giving or spending money 'arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful,' " even the restrictive standard of *United States* v. *O'Brien* is not satisfied. 424 U.S. at 17 (quoting United States v. O'Brien, 391 U.S. 367, 382 (1968)); *see* Citizens Against Rent Control v. City of Berkeley, 27 Cal. 3d 819, 838, 614 P. 2d 742, 753, 167 Cal. Rptr. 84, 95 (1980) (Richardson, J., dissenting), *prob. juris. noted,* 49 U.S.L.W. 3616 (U.S. Feb. 24, 1981) (No. 80-737):

> The term "corrupt" implies the existence or expectation of a political *quid pro quo.* In addition, the term "corruption" subtly conveys the impression that there is a deviation from an objective standard. Such a belief can have no validity. In a democratic system objective "truth" is that which the majority subjectively chooses to adopt.

[56] *See* Eastern R. R. Presidents Conference v. Noerr Motor Freight Co., 365 U.S. 127, 137 (1961) ("In a representative

Attempts by citizen groups to persuade a candidate or officeholder that their views on public issues are correct enjoy the same First Amendment protection as attempts to persuade fellow citizens to embrace a particular candidate or political philosophy. In the case of the independent expenditures by political committees limited by § 9012(f), any influence[57] over either voter or candidate is the legitimate outcome of the democratic process.[58]

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democracy such as this, [all three] branches of government act on behalf of the people and, to a large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."); FEC v. AFC at 18a ("Individuals, by associating in political committees, can express viewpoints that complement the positions of the favored candidate, or, *they can express viewpoints which seek to influence or prod the candidate and the public.")* (emphasis added); V. O. Key, Jr., Politics, Parties and Pressure Groups 130 (5th ed. 1964); D. Truman, The Governmental Process 10-11, 46 (2d ed. 1971).

[57] *Bellotti* distinguishes the legitimate use of effective political expression by large corporations to influence political decisionmakers (*i.e.*, voters in referendum elections) from corrupt agreements to "buy" their votes. *See* 435 U.S. at 790 ("the fact that advocacy may persuade the electorate is hardly a reason to suppress it"); Let's Help Fla. v. McCrary, 621 F.2d 195, 200 (5th Cir. 1980); C & C Plywood Corp. v. Hanson, 583 F.2d 421, 425 (9th Cir. 1978); Schwartz v. Romnes, 495 F.2d 844, 851 (2d Cir. 1974) (emphasis added):

> Corporate funds *paid to a candidate* or political party have the potential of creating debts that must be paid in the form of special interest legislation or administrative action. In contrast, when the issue is one to be resolved by the public electorate monies paid by a corporation for public expression of its views create no debt or obligation on the part of the voters to favor the corporate contributor's special interest.

[58] The court below recognized that, in the absence of a *quid pro quo* arrangement, a "candidate will no more be beholden to the political committees than Presidents typically are to those elements of their constituency who voted for them." FEC v. AFC at 20a. "This public comment," the court held, "may persuade, and thereby influence decisionmakers, but it is protected by the First Amendment." *Id.; accord,* United States v. Congress of Indus. Organizations, 335 U.S. 106, 144-45 (1948) (Rutledge, J., concurring) (" '[U]ndue influence' in this connection may represent no more than convincing weight of argument fully presented, which is

Buckley plainly states that the constitutional guarantee of free political expression:

> denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution, it is not the government, but the people — individually as citizens and candidates and *collectively as associations and political committees* — who must retain control over the quantity and range of debate on public issues in a political campaign.

424 U.S. at 57 (emphasis added).

3. Alternative measures less restrictive of First Amendment rights fully serve the governmental interest in stemming corruption or the appearance of corruption.

In *Buckley*, this Court held that a limitation on independent expenditures such as § 9012(f) is unnecessary to prevent the reality or appearance of corruption because alternative measures less restrictive of First Amendment rights fully serve that governmental interest. *Id.* at 55. *Buckley* recognized that even without limitations on independent expenditures, FECA and the Fund Act contain a comprehensive set of (1) prohibitions and limitations on contributions, (2) regulation of "coordinated" expenditures, and (3) disclosure requirements that serve to prevent the opportunity for corrupt *quid pro quo* arrangements. Under this existing statutory framework, an additional limitation on independent expenditures is unconstitutional because " '[i]n the area of First Amendment freedoms, government has the duty to confine itself to *the least* intrusive regulations which are adequate for the purpose.' " *Id.* at 238 (opinion of Burger, C.J.) (quoting *Lamont, supra,* 381 U.S. at 310 (Brennan, J., concurring)).[59]

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the very thing the Amendment and the electoral process it protects were intended to bring out.")

[59] *See* Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."); Note, *Less Drastic Means and the First Amendment,* 78 Yale L. J. 464 (1969).

Under the Fund Act, all contributions to presidential candidates who accept public financing are prohibited. As *Buckley* noted with respect to the analogous contribution limitations contained in FECA, "[t]here is no indication that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations will be insufficient to police the contribution provisions." 424 U.S. at 56. Contribution limitations, "along with the disclosure provisions, constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions." *Id.* at 58.

FECA also limits the size of contributions to a political committee such as AFC. Contributions to a political committee of more than $5,000 in any calendar year are prohibited, even in a publicly funded presidential campaign. *See* 2 U.S.C. § 441a(a)(1)(C). As the Court concluded in *California Medical Association,* this safeguard constitutes a significantly less intrusive restriction on First Amendment rights than an independent expenditure limit, since it permits a political committee to aggregate limited contributions from an unrestricted number of persons in order to undertake political advocacy. *See* 49 U.S.L.W. at 4846 (plurality opinion of Marshall, J.); *id.* at 4848 (Blackmun, J., concurring in judgment).

Another provision of FECA, § 441a(a)(7)(B)(i), prevents circumvention of the contribution limits and constitutes the alternative measure least restrictive of First Amendment rights. *See* 2 U.S.C. § 441a(a)(7)(B)(i). Under § 441a(a)(7)(B)(i), a "contribution" is defined to include "expenditures made by any person in cooperation, consultation, or concert with, or at the request or

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Appellant's reliance on *United States Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548 (1973), is misplaced. Restrictions on the partisan political activity of government employees are permissible under the First Amendment only because government as an employer has a compelling interest in ensuring the integrity of its workforce. The government cannot, consistent with the First Amendment, impose such restrictions on individuals or groups who have not entered an employment relationship with government. *Id.* at 564.

suggestion of, a candidate." *Id.* Such a "coordinated" expenditure is prohibited if a presidential candidate accepts public financing.[60] The FEC retains broad authority to investigate charges that political committee expenditures result from prearrangement with a candidate and to seek civil and criminal penalties for violations of the Fund Act's prohibition on contributions to presidential candidates.[61] *Buckley* held that regulation of coordinated expenditures, rather than limitations on independent expenditures, is the proper vehicle to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." 424 U.S. at 47.[62]

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[60] *See* Republican Nat'l Comm. v. FEC, 487 F. Supp 280, 288-89 (S.D.N.Y.) (three-judge court), *aff'd*, 445 U.S. 955 (1980) ("any expenditure made in 'coordination' with a candidate's campaign must be treated as a 'contribution' to the candidate under 2 U.S.C. § 441a(a)(7) and would be illegal in the case of a candidate who opted for public funding under the Fund Act.")

[61] *See* 2 U.S.C. § 437g. The FEC has commenced an administrative enforcement action following charges by Common Cause and the Carter-Mondale Re-Election Committee that appellees' expenditures were coordinated with the Reagan campaign. All of AFC's expenditures were made independently of the Reagan campaign. AFC made no contributions to the Reagan campaign in either the primary or general election. In this case, appellants concede that AFC made only independent expenditures. *See* Jurisdictional Statement, Common Cause v. Schmitt, at 6 n.7. Despite its concession, Common Cause's brief sets forth a litany of unsubstantiated charges that AFC's expenditures were actually disguised contributions. *See* Brief of Appellant Common Cause, at 6-10, 31-32.

[62] *See* FEC v. AFC at 13a n.29 ("Pivotal to the Court's analysis of electoral integrity *vis a vis* independent expenditures was the statutory provision that 'controlled or coordinated expenditures are treated as contributions rather than expenditures.' ") (quoting Buckley, *supra*, 424 U.S. at 46). After *Buckley* invalidated FECA's limitation on independent expenditures, Congress amended the Act in 1976 in an effort to close even more securely any loophole that might exist for coordinated expenditures. *See, e.g.*, H.R. Rep. No. 917, 94th Cong., 2d Sess. 6 (1974), *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 806 (1977):

> [T]he bill treats expenditures made in cooperation, consultation, or concert with or at the request or suggestion of a can-

FECA's extensive reporting and disclosure requirements guarantee that all contributions and independent expenditures by political committees are subjected to full public scrutiny. A political committee such as AFC must register with the FEC and keep detailed records of "both contributions and expenditures." *Id.* at 63; *see* 2 U.S.C. §§ 433-34. Such "[e]xtensive reporting, auditing, and disclosure requirements . . . facilitate the detection" of corrupt agreements. *Buckley, supra,* 424 U.S. at 56.[63]

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didate as a contribution in kind to that candidate and provides further that the republication of a candidate's campaign materials shall be regarded as a contribution. This provision is designed to draw a line between "independent expenditures" protected by the First Amendment because they are an expression of an individual's views, and expenditures which are disguised contributions to a candidate.

Accord, 122 Cong. Rec. 12203 (1976) (remarks of Rep. Brademas); *id.* at 8882 (remarks of Rep. Gaydos).

[63] The three-judge court did not err in holding § 9012(f) unconstitutional without permitting the additional discovery sought by Common Cause. Since appellees clearly have standing to raise the constitutional issue and there is no question as to the manner in which § 9012(f) applies to their conduct, the court was free to make a determination that § 9012(f) was facially invalid without development of the facts Common Cause now seeks to discover. *See* California Medical Ass'n, *supra,* 49 U.S.L.W. at 4845 n.14 (plurality opinion of Marshall, J.) In *Village of Schaumburg* v. *Citizens for a Better Environment,* 100 S. Ct. 826 (1980), this Court held an ordinance prohibiting solicitation of contributions by certain charitable organizations invalid on its face. The Village had sought an opportunity to prove that the characteristics of the group involved supported the validity of the provision. The court of appeals held that such issues of fact were immaterial to a consideration of facial validity. *Id.* at 831. This Court concluded that the court of appeals was "free to inquire whether [the ordinance] was overbroad, a question of law that involved no dispute about the characteristics of [the group]." *Id.* at 835. The facts Common Cause now seeks to discover would be equally immaterial to this Court's consideration of the constitutionality of § 9012(f) on its face. *See* Brief of Appellant Common Cause, at 43.

In dismissing Count II of Common Cause's complaint for lack of subject matter jurisdiction the three-judge court stated "[i]t would be incongruous and cumbersome for a three-judge district

CONCLUSION

For the foregoing reasons, the First Amendment right of political committees, such as AFC, to make independent expenditures for communications supporting publicly funded presidential candidates must be preserved inviolate. *See id.* at 58-59; *California Medical Association, supra,* 49 U.S.L.W. at 4846 (plurality opinion of Marshall, J.). Appellees AFC, Schmitt and Curtis respectfully pray that the judgment below be affirmed.

Respectfully submitted,

JAN W. BARAN
Counsel of Record
WILLIAM H. SCHWEITZER
REBECCA L. JACKSON
LEE LEVINE
BAKER & HOSTETLER
818 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 861-1500
Counsel for Appellees
Harrison H. Schmitt,
Carl T. Curtis and
Americans for Change

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court, ordered by Congress to expedite its consideration, to supervise extensive discovery and receive detailed factual evidence." FEC v. AFC at 26a. It noted that such discovery was relevant only to "a determination of *compliance* with the election laws" and not to consideration of the constitutionality of the Act. *Id.* (emphasis in original). Common Cause is attempting to remand for discovery of facts that are unrelated to the purpose for which it originally sought discovery. During oral argument before the district court, Common Cause stated that it needed discovery to establish its proposition in Count II that appellees' expenditures were conducted sufficiently in concert with the Reagan campaign to constitute coordinated expenditures. *See* Transcript of Oral Argument, at R. 86A, 18-19 (July 8, 1980).

APPENDIX A



Don't give up on turning this country around.

THE CARTER RECORD

GIVING UP ON THE BUDGET

When Carter took office, America had a national debt of $709.1 billion. Four years later, we're $1.01 trillion behind in our bills, an increase of 42%, and still adding.

GIVING UP ON INFLATION

In 1976, Carter promised to reduce inflation from 4.8% to 4.0% by 1980. Instead, Carter allowed inflation to rise to 6.8% in his first year, 9.0% in his next year, 13.3% by the end of 1979 and to 18.2% in the first quarter of this year.

THE REAGAN RECORD

TURNING THINGS AROUND

Before Reagan, California had a public debt of $197 million and was going broke to the tune of $1 million a day. At the end of his term, Reagan had the state $554 million in the black.

TURNING THINGS AROUND

Reagan beat inflation in California, where the rate had been higher than the national average prior to his taking office. Reagan held inflation to the national average for two years and then brought it under the U.S. average his last six years.

GIVING UP ON JOBS

Carter promised to reduce unemployment to 4 - 4½% by the end of his term. We now have 7.8% unemployment, with 8.2 million people out of work. That figure is expected to mushroom to a shameful 9%.

TURNING THINGS AROUND

As governor of California, Reagan implemented ingenious ways to put even the hard core unemployed to work. He developed programs to train and employ more than 75,000 minority youths and chronic unemployed. The same kind of thing can be done for America, and he's the man to do it.

GIVING UP ON LOWER TAXES

Already, Carter has hit the American worker with the largest single tax increase in history. The feds now swallow up 1/5 of the average citizen's income. And Carter's load of new taxes will mean increased taxes of about $200 billion a year for the next decade.

TURNING THINGS AROUND

During his 8-year term as governor of California, our most populous state, Reagan returned $5.7 billion in tax relief to the people where it belonged. For the nation, Reagan has already said he will cut your income taxes. And he's proved he knows how to do it.

If you give up now, you'll be giving more later. With four more years of Jimmy Carter, you'll have less of what you want, and more of what you don't want. Less productivity. Less efficiency. Less leadership. More taxes. More inflation. More unemployment. Carter's record doesn't just speak for itself. It shouts.

You can help turn this country around by voting for Ronald Reagan and George Bush, the men who will give America the changes we all know are possible.

With a contribution of time or money to Americans for Change, sponsors of the "Reagan for President in '80" advertising campaign, you'll help spread the word for the change American needs. Right now.

Reagan for President in '80

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Paid for by

Americans for Change

Senator Harrison Schmitt (R. - N.M.) Chairman

218 North Lee Street, Suite 319, Alexandria, Virginia 22314. Phone 703-683-5221.

APPENDIX B

AMERICANS FOR CHANGE — RADIO SPOTS

I. FEELING GOOD

Narrator: Four years ago today we were feeling good about America. Inflation was easing. The economy was strong. The world was at peace and we had every reason to be optimistic about the future. Then we elected Jimmy Carter president. Since then, inflation has gotten worse. The economy has turned sour. The world has become more dangerous. Our optimism has been replaced with pessimism and a feeling of helplessness. We don't blame everything that has happened in those four years on Jimmy Carter, but we remember what Harry Truman once said, "The buck stops here." Well, no matter how they pass the buck, we believe it leads to one painful fact — Jimmy Carter can't run this country. We've got to change the direction America is going in and the only way to do that is to elect Ronald Reagan and George Bush. They will give us back the America that Jimmy Carter took away.

This announcement was not authorized by any candidate. It was paid for by Americans for Change, Senator Harrison Schmitt, Chairman.

II. 1976 NEWSPAPER

Person 1: Well thank you President Carter. You really hit us where we live — right at home plate.

Person 2: What are you carrying on about?

Person 1: I found this 1976 newspaper when I was cleaning out the closet. Will you look at the price of this house the year Carter was elected?

Person 2: Hmm? That same house costs twice as much today. Back then we could have bought it.

Person 1: Right now we can't afford it with our two salaries combined.

Person 2: Look at that interest rate 8 1/2%. This spring it almost doubled that.

Person 1: Would you tell me why we voted for Carter in the first place? We had it so good before he came along.

Person 2: Well, we are going to change things this time honey — with Reagan.

Narrator: At today's interest rates, 90% of the people in America cannot afford to buy a home. It doesn't have to be that way. Vote for Ronald Reagan and George Bush — the men who will give us the changes we all know are possible.

This announcement not authorized by any candidate. It was paid for by Americans for Change, Senator Harrison Schmitt, Chairman.

III. INFLATION AND TAXES

Person 1: Taxi! Say, I've been out of the country. Have we had the Presidential debates yet?

Person 2: Well, Reagan and Anderson debated.

Person 1: What about Carter?

Person 2: Are you kidding? Debate with his record? In '76 Carter promised to get inflation down to 4%. This year it hit 18% at full gallup.

Person 1: Guess he gave up on inflation.

Person 2: Well, Reagan wouldn't. He beat inflation in California. He took them from above to below the national average and kept them there.

Person 1: Turned things around, huh?

Person 2: And did the same things for taxes. Reagan returned 5.7 billion in tax relief to the people — where it belonged.

Person 1: No kidding?

Person 2: Yeh. But not Carter. He gave us the biggest tax increase in history. The feds now gobble up — get this — one-fifth of our paycheck.

Person 1: Maybe Reagan is the man to turn the country around.

Person 2: Oh, I don't think there is any debate about that.

Narrator: Vote for Ronald Reagan and George Bush — the men who will give us the changes we all know are possible.

Paid for by Americans for Change, Senator Harrison Schmitt, Chairman. Not authorized by any candidate.

APPENDIX C

Americans for Change

sponsors of REAGAN FOR PRESIDENT IN '80
218 North Lee Street, Suite 319, Alexandria, Virginia 22314
(703) 683-5221

Executive Committee

Harrison (Jack) Schmitt, *Chairman*
U.S. Senator, New Mexico

John L. Harmer, *Co-Chairman*
Former Lt. Governor, California

Dave Durenberger, *Co-Chairman*
U.S. Senator, Minnesota

Carl T. Curtis, *Treasurer*
U.S. Senator, Nebraska (Ret.)

Brad O'Leary, *Vice-Chairman*
Executive Director of Reagan for President in '80

Howard Ruff, *Co-Finance Chairman*
Chairman, Target, Inc.

October 9, 1980

Dear National Steering Committee Member:

I have enclosed a cassette tape of several Reagan/Bush radio spots dealing with the economy. Our committee will run these commercials in swing states.

I want to tell you how critical a period we are entering with the election only four weeks away. Your support at this time could make the difference.

I need to ask for your help in raising funds for advertising on TV, radio and in newspapers. Can I count on your assistance?

In particular, I hope you will consider sending out one of the enclosed letters to friends in your area which you know can help.

I have asked one of my staff members to call you and see which letter you might use and how many tapes we can send you.

Please respond today — the timing is crucial.

Sincerely,

/s/ Harrison (Jack) Schmitt
HARRISON (JACK) SCHMITT
U.S. Senator, New Mexico

Authorized and paid for by AMERICANS FOR CHANGE, an independent committee not authorized by any candidate.

APPENDIX D

HARRISON (JACK) SCHMITT
UNITED STATES SENATOR
NEW MEXICO
AUGUST 21, 1980

Dear Fellow American,

I was privileged, eight years ago, to be part of an American Astronaut team that landed on the moon. The members of that team raised the American Flag during that final trip. Today the Stars and Stripes is still the only flag that has ever flown on the surface of the moon.

I hope you also remember that in that same year Ronald Reagan was completing his second successful term as Governor of our country's largest state, California.

I clearly remember that this was a time when Americans were proud of their Flag and country. I remember it as a time when we believed that creativity, determination and our work ethic would allow Americans to overcome any obstacle.

I must ask you to reflect a minute on just *what has happened to our country*? Do we no longer have leaders in our government capable of achieving solutions to our problems? Solutions that eight years ago we were clearly able to achieve. Have we lost our ability to achieve greatness? Is there no hope for the future?

I share your sense of frustration as we see a deepening recession causing layoffs and entire plants to close as unemployment reaches almost 8%. Your ability to save and plan for the future is being subverted by double digit inflation Carter refuses to control.

You and I read daily about our allies who treat the Carter administration with public condescension and private contempt. Our enemies act as if America is a second rate power that can be blackmailed by any petty dictator that desires.

I have heard with my own ears Carter stating that the problems of America are too complicated for him and his advisors to solve.

Jimmy Carter has clearly demonstrated that he is a hopelessly inept and indecisive President who is content to be manipulated by

domestic inflation and recession and by any petty despot who seeks to humble America.

I believe our country is still the greatest nation on the face of the earth. You and I as American citizens can hope and dream of a better tomorrow. We know such a tomorrow is achievable.

I am willing to work and dream of a better future and I know you share my feelings. But we need to be led by men and women who can inspire this country to unleash the competitive drive that tamed our frontiers.

As Governor of California, Ronald Reagan was able to attract just such high calibre men and women to serve in state government. I want you to know they were men and women who helped lead the state of California into eight years of prosperity, low unemployment and inflation that never topped 3%.

I believe Ronald Reagan and the American leaders he will bring to Washington will make positive contributions for a better America. A Reagan administration can better deal with the problems of faltering industry, inflation, too little energy development, pollution, crime, inadequate national defense and a frustrating sense that America has lost its will to lead the forces of freedom in a dangerous and volatile world.

I invite you to join me as a member our independent committee whose goal is to send Ronald Reagan to Washington as the next President of the United States, so Americans can once again feel a sense of pride in their flag and their country.

The federal law prohibits Ronald Reagan from accepting a financial contribution from you for the general election. The law also limits the amount of money Reagan can spend on voter educational material for your friends and neighbors. You, however, may make an independent contribution for this material and distribute it on behalf of Governor Reagan. Will you help?

I know you understand that the federal election law gives a tremendous advantage to an incumbent President who is willing to use almost unlimited government funds, government employees and government resources to promote his candidacy.

I urge you to become a Reagan Independent Voter Chairman and accept the responsibility of identifying 10 Reagan voters in your community and urging them to vote on Nobember 4, 1980.

Only if you agree to serve can we be guaranteed a fair and balanced election. I am afraid that without your participation Carter will use the incumbency for an unfair advantage that Reagan may not be able to overcome.

If you agree to serve as a Reagan Independent Voter Chairman, you will receive an election kit with detailed information on how you can help.

Your kit will contain Reagan buttons, bumper strips and window signs that can also be used as yard signs. You will also receive brochures on the five issues of greatest concern to Americans today.

I will also send you detailed instructions on how to go about recruiting 10 of your friends and neighbors to make a commitment to support Governor Reagan.

Your kit will include membership identification as a Reagan Independent Voter Chairman and 10 electiongrams to mail to your friends the Sunday before the election.

I believe you must help if we are to elect a President who will show strong leadership, strength of character, and a man we can be proud of as he serves us and as he solves the problems confronting America. That man is Ronald Reagan.

You must become involved if Reagan is to become President.

I hope you will help by sending a contribution of at least $19.80 which will cover the cost of the Reagan Independent Voter Kit. Any additional funds you wish to contribute will allow us to distribute kits to Reagan supporters who cannot afford to make a contribution.

I want you to understand that the election in your state could be decided by just one vote per precinct. Your commitment to help could make the difference in this election.

May I count on you for a commitment to Governor Reagan and the future of our Country. . . .

Sincerely,

/s/ Harrison Schmitt

HARRISON "JACK" SCHMITT

U. S. Senator, New Mexico

Not printed or mailed at government expense. Paid for by AMERICANS FOR CHANGE, NOT AUTHORIZED BY ANY CANDIDATE.

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Nos. 80-847 and 80-1067

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMON CAUSE, *et al., Appellants,*

v.

HARRISON SCHMITT, *et al., Appellees.*

and

FEDERAL ELECTION COMMISSION, *Appellant,*

v.

AMERICANS FOR CHANGE, *et al., Appellees.*

On Appeal From The United States District Court For the District Of Columbia

BRIEF FOR APPELLEE FUND FOR A CONSERVATIVE MAJORITY

J. CURTIS HERGE
ROBERT R. SPARKS, JR.
Counsel of Record

SEDAM & HERGE, P.C.
7600 Old Springhouse Road
McLean, Virginia 22102
(703) 821-1000

Attorneys for Appellee, Fund For A Conservative Majority.

July 8, 1981

QUESTION PRESENTED

Whether, in light of the holding in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), Section 9012(f) of the Presidential Election Campaign Fund Act may constitutionally limit the amount of money which political committees may spend as independent expenditures to further the election of a publicly-financed presidential candidate.

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On Appeal From The United States District Court For the District Of Columbia

---

BRIEF FOR APPELLEE FUND FOR A CONSERVATIVE MAJORITY

STATEMENT OF THE CASE

A. The Fund Act.

In 1971, Congress enacted the Presidential Election Campaign Fund Act, 26 U.S.C. §9001 *et seq.* ("Fund Act"), to provide for public financing of Presidential general election campaigns as an alternative to private fundraising by candidates. In order to be eligible to receive public funding, candidates must certify to the Federal Election Commission ("the Commission") that

they and their authorized committees[1] will abide by restrictions on contributions and expenditures which they can incur in connection with their Presidential or Vice Presidential campaigns. 26 U.S.C. §§9002(4) and 9003.

Specifically, candidates of a major political party who receive public funding under the Fund Act must pledge that neither they nor their authorized committees will incur "qualified campaign expenses"[2] in excess of the amount of public funds received, 26 U.S.C. §9003(b)(1), and that they will not accept private contributions to defray such expenses. 26 U.S.C. §9003(b)(2). In addition, expenditures by individuals and groups in coordination with the candidate's campaign are forbidden, by virtue of the statutory definition of "contribution," which includes "expenditures . . . made in cooperation, consultation or concert with" a candidate or his campaign. 2 U.S.C. §441a(a)(7)(B)(i).

A candidate who chooses to receive public funding under the Fund Act must also agree: to keep and furnish to the Commission such books, records, and other infor-

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[1] A "political committee" is defined by the Fund Act as:

> . . . any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office. 26 U.S.C. §9002(9).

A political committee is an "authorized committee" of candidates for President or Vice President if it is "authorized in writing by such candidates to incur expenses to further the election of such candidates." 26 U.S.C. §9002(1).

[2] "Qualified campaign expenses" are those campaign-related expenses incurred by the candidates, their authorized committees, or by any person authorized by the candidates or by any of their authorized committees. 26 U.S.C. §9002(11).

mation as the Commission may request pertaining to the candidate's campaign expenditures; to submit to an audit and examination by the Commission after the election; and to make such repayments of public funds as may be required by the Commission as a result of such audit. 26 U.S.C. §9003(a).

The provision of the Fund Act at issue in this appeal, 26 U.S.C. §9012(f), limits expenditures by political committees which are unaffiliated with, and completely independent of, authorized committees of a Presidential or Vice Presidential candidate. That section makes criminal the expenditure of more than $1,000 by an independent political committee "to further the election" of a Presidential or Vice Presidential candidate who has chosen to receive public funding of his campaign. Any officer or member of an independent political committee who violates section 9012(f) is subject to a fine of not more than $5,000, or one year imprisonment, or both. 26 U.S.C. §9012(f)(3).

Section 9012(f) does not apply to expenditures by broadcasters or by a periodical publication in reporting the news or in taking editorial positions, and to expenditures by a tax-exempt organization in communicating to its members the views of that organization.

B. FCM's Activities.

Ronald Reagan chose to accept public funding under the Fund Act in order to finance his 1980 Presidential general election campaign. Accordingly, Mr. Reagan and his authorized committees were barred from accepting private contributions to defray the costs of his campaign, and from spending more than the amount which he received under the Fund Act.[3]

[3] Mr. Reagan and former President Carter, who also chose to receive public funding, each received $29,440,000 under the Fund Act.

Appellee Fund For A Conservative Majority ("FCM") is a multicandidate political committee,[4] incorporated as a nonstock, not-for-profit corporation under the laws of Virginia, and is registered with the Commission pursuant to 2 U.S.C. §433. FCM originally registered in 1972 with the General Accounting Office under the name "Young Americans Campaign Committee." On October 13, 1976, FCM amended that filing to change its name to Fund For A Conservative Majority.

During calendar year 1980, FCM, through its project, "Citizens For Reagan in '80," made approximately $1.9 million in independent expenditures in support of Mr. Reagan. "Citizens For Reagan in '80" was the title of a program administered by FCM, and designed to describe its independent expenditures project in support of Mr. Reagan. All of FCM's fundraising literature made clear by express disclaimers that "Citizens For Reagan in '80" was a project of FCM, and that its activities were not paid for or authorized by any candidate.[5]

C. The Proceedings Below

The Common Cause appellants ("Common Cause") and the Commission filed suit against appellees challenging the legality of their plans, reported in the press, to conduct an independent expenditure campaign in support

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[4] A "multicandidate political committee" is defined as:

> . . . a political committee which has been registered under [2 U.S.C. §433] . . . for a period of not less than 6 months, which has received contributions from more than 50 persons, and, . . . has made contributions to 5 or more candidates for Federal office. 2 U.S.C. §441a(a)(4).

[5] *See, e.g.,* FCM fundraising literature at Common Cause Exhibits to Appendix I To Jurisdictional Statement 38b-48b.

of Mr. Reagan's candidacy for President. Both suits sought declaratory relief as to the constitutionality of Section 9012(f) and its applicability to the activities of appellees.[4]

Appellees moved for summary judgment and dismissal in both actions, arguing that Section 9012(f) was unconstitutional to the extent that it applied to their activities. On August 28, 1980, a three-judge district court issued orders dismissing both actions. As to the Commission's suit, the court granted defendants' motions for summary judgment on the merits. Count I of the Common Cause lawsuit was dismissed as moot in light of the court's disposition of the Commission's suit. Count II was dismissed for want of subject-matter jurisdiction, and for failure to state a claim upon which relief could be granted. On September 25, 1980, the court consolidated both cases and on September 30, the court issued its opinion in support of its August 28, 1980 orders disposing of both actions.

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[4] The Common Cause suit was in two counts: Count I alleged that defendants' activities on behalf of Mr. Reagan violated Section 9012(f)(1). Count II alleged that the activities of the defendants also violated other provisions of the Fund Act, and sought pretrial discovery with respect to those activities. Specifically, in Count II of its Complaint, Common Cause asserted that defendants' expenditures would be "conducted in tandem with and parallel to the official Reagan campaign." Such parallelism, it was alleged, resulted in violations on Mr. Reagan's part of his renunciation of private fundraising and excess expenditures in return for public funding of his campaign.

The Commission's suit, in a single count, alleged that appellees intended to raise and spend in excess of $1,000 to further Mr. Reagan's candidacy, and sought a declaration that such conduct would violate Section 9012(f), which the Commission also asked be declared constitutional.

D. The Opinion Of The Three-Judge Court Below

The three-judge district court struck down Section 9012(f) after a lengthy — and, we contend, correct — analysis of this Court's opinion in *Buckley* v. *Valeo*, 424 U.S.1 (1976). The lower court noted that supporters of candidates have rights separate from the candidates they favor, rights which cannot be abridged by the candidate's choice with regard to public funding. The Court held that there was no constitutional reason why the gathering of individuals into political committees should "impugn the distinct and separate rights of campaign outsiders to sponsor political speech." Commission Appendix A at 16a. Individuals, the Court held, speak through political committees, and so long as they — and the committees — are independent of the candidate, their expenditures pose no danger to the integrity of the political process. *Id.* at 21a.

Accordingly, the Court found no compelling governmental interest sufficient to justify Section 9012(f)'s undisputed restraint on First Amendment freedoms, and held that section facially unconstitutional.

SUMMARY OF ARGUMENT

Our argument can be simply stated. Comment and debate concerning public affairs, including candidates for election, constitute speech which is protected by the First Amendment. The fact that such speech depends on the expenditure of money does not alter its protection under the First Amendment. Section 9012(f) of the Fund Act, by its limitation on expenditures which might "further" the election of a candidate, restricts the quantity and scope of political speech. Such a restriction can be tolerated only if there is a compelling governmental interest in suppressing that speech. There is not a single

justification argued by appellants in support of Section 9012(f)'s burden on speech which was not considered and rejected by this Court in *Buckley* v. *Valeo, supra,* which held unconstitutional a provision of the Federal Election Campaign Act of 1971 ("FECA") which operated in the same manner — and with the same effect — as Section 9012(f) does in these cases.

Section 9012(f) is also unconstitutionally vague since it restricts and makes criminal expenditures "to further" the election of a publicly-funded Presidential or Vice Presidential candidate, without anywhere defining the words "to further," or otherwise delineating the boundary between permissible and impermissible speech. Section 9012(f), which operates in an area permeated with First Amendment interests, therefore unconstitutionally chills the right of citizens to speak out on matters concerning publicly-funded candidates.

I

SECTION 9012(f) VIOLATES THE FIRST AMENDMENT

A. Section 9012(f) Burdens Freedom Of Speech And Association, Both of Which Are Protected Under The First Amendment.

Section 9012(f) of the Fund Act makes it unlawful for any political committee which is not an authorized political committee[7] of a candidate for President or Vice President to expend more than $1,000 "to further the election" of that candidate. Section 9012(f) operates —

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[7] An "authorized committee" of a candidate is one which is authorized in writing by a candidate to incur expenses to further the election of that candidate. 26 U.S.C. §9002(1). All other political committees are, therefore, bound by the strictures of Section 9012(f).

to bar independent expenditures by "unauthorized" political committees — only if the candidate has chosen to accept public funding of his or her campaign under the Fund Act. Thus far, every major Presidential candidate since the Fund Act took effect has chosen public financing in the general election. Because the public grant under the Fund Act is so large, future Presidential candidates are likely to choose that means of financing their campaigns, thereby confronting their supporters with the severe restrictions and criminal sanctions of Section 9012(f), if those supporters try to speak out through the medium of a political committee.

By its decision in *Buckley* v. *Valeo, supra,* this Court established two fundamental principles: first, expenditures made to further the election of a candidate for public office constitute political speech protected by the First Amendment; second, where such expenditures are made independent of a candidate and his campaign, no compelling governmental interest exists sufficient to justify their regulation. Since *Buckley,* the Court has reaffirmed those principles. *Republican National Committee* v. *Federal Election Commission,* 487 F.Supp.280 (S.D.N.Y.) (three-judge court), *aff'd mem.,* 445 U.S.955 (1980).

In *Buckley,* this Court observed that contribution and expenditure limitations "operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." 424 U.S. at 14. The Court has also noted that in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth* v. *United States,* 354 U.S. 476, 484 (1957),

the First Amendment affords the broadest protection to the discussion of public issues. Similarly, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S 64, 74-75 (1964). Statutes which restrict such speech, the Court has held, are considered against the background of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

Political debate is not limited only to discussion of public issues. "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates. . . ." *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). "In a republic where the people are sovereign," this Court wrote in *Buckley*, "the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." 424 U.S. at 14-15. To the same effect, this Court has noted that "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co* v. *Roy*, 401 U.S. 265, 272 (1971).

The First Amendment protects more than just speech. It protects political association, as well as political expression. *Buckley* v. *Valeo*, 424 U.S. at 15. This is because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . ." *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958). The

First Amendment guarantees "freedom to associate with others for the common advancement of political beliefs and ideas [which] is a form of 'orderly group activity' protected by the First and Fourteenth Amendments." *Kusper* v. *Pontikes*, 414 U.S. 51, 56-57 (1973), quoting *NAACP* v. *Button*, 371 U.S. 415, 430 (1963). *See also Cousins* v. *Wigoda*, 419 U.S. 477 (1975).

A restriction on the amount which a political committee may spend on political expression "is simultaneously an interference with the freedom of its adherents." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957). For such a restriction precludes a political committee from "effectively amplifying the voice of [its] adherents, the original basis for the recognition of First Amendment protection of the freedom of association." *Buckley* v. *Valeo*, 424 U.S. at 22.

Section 9012(f) therefore directly burdens First Amendment freedoms of individuals who, independently of a candidate, wish to make themselves heard by joining together to maximize the effect of what funds they have to spend on political expression.

B. Independent Expenditures By A Candidate's Supporters Cannot Be Restricted.

In *Buckley*, this Court had before it an array of constitutional challenges to the contribution and expenditure provisions of the Federal Election Campaign Act of 1971, as amended in 1974 ("FECA"). The Court held that limitations on the amount which could be contributed to a candidate, directly or through an intermediary, entailed only a "marginal restriction upon the contributor's ability to engage in free communication." 424 U.S. at 21.

The Court noted that restrictions on contributions necessarily restricted "one aspect of a contributor's right of political association, which is a 'basic constitutional freedom,' that is 'closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.' " *Id.* at 25. (citations omitted.) Nevertheless, the primary purpose of FECA — to limit the actuality and appearance of corruption resulting from large individual financial contributions — was sufficient to justify a limitation on contributions to candidates. But the Court permitted such a restriction partly because it also found that effective, alternative means of political expression were available to citizens, individually and in groups. *Id.* at 28.

The result was different when it came to expenditure limitations. Section 608(e)(1), the independent expenditure limitation before this Court in *Buckley,* restricted expenditures "relative to a clearly identified candidate" by individuals and groups. The Court flatly held that restrictions and expenditures during a campaign restricted the quantity of political speech:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech. 424 U.S. at 19.

The Court considered expenditure restrictions to be "substantial rather than merely theoretical restraints on the quantity and diversity of political speech," which would "exclude all citizens and *groups* . . . from any significant use of the most effective modes of communication."[8] *Id.* at 19-20 (emphasis added). Similarly, the Court noted that a primary effect of expenditure limitations was "to restrict the quantity of campaign speech by individuals [and] *groups*. . . ." *Id.* at 39 (emphasis added). Again and again, the Court noted the effect of FECA's expenditure limitations on groups.

The lower court in *Buckley* had held Section 608(e)(1) constitutional on the ground that it was "a loophole-closing provision only," necessary to prevent circumvention of the contribution limitations of the FECA. This Court rejected that justification, noting, in comparison to limitations on contributions, the "far greater" restraints on the freedom of speech and association imposed by expenditure limitations. Section 608(e)(1) the Court decided, would have to pass constitutional muster on its own:

> The markedly greater burden on basic freedoms caused by §608(e)(1) thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations. Rather, the constitutionality of §608(e)(1) turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression. 424 U.S. at 44-45.

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[8] The Court underscored its point by observing that "as of January 1, 1975, one full-page advertisement in a daily edition of a certain metropolitan newspaper cost $6,971.04. . . ." 424 U.S. at 20, n. 20.

In contrast to the outcome with respect to contribution limitations, the Court found that the governmental interest in preventing the appearance or reality of corruption was simply insufficient to justify the ceiling on independent expenditures contained in Section 608(e)(1). The Court explained why that was so:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, §608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse. *Id.* at 47.

After *Buckley,* then, it was settled that expenditures for the purpose of furthering the election of a candidate for elective office constituted protected political speech, and that there was no governmental interest sufficient to justify the regulation of such expenditures when they were made independent of a candidate's campaign.

C. A Limitation On Expenditures By An Independent Political Committee Restricts The Speech Of Its Members

The expenditure provision struck down in *Buckley* prevented effective and independent advocacy of a candidate by his supporters — singly and in groups. Appellants do not dispute that Section 9012(f) would likewise restrict effective and independent advocacy, but they argue that because Section 9012(f), applies only to political committees, and not to individuals, that makes all the constitutional difference between these cases and *Buckley.*

Common Cause, for instance, argues that Section 608(e)(1) was an "across-the-board restriction" on independent advocacy which barred "essentially *all* expenditures by *all* individuals, as well as by *all* groups,"[9] whereas, according to Common Cause, only certain groups are restricted by Section 9012(f). Thus, the argument goes, *Buckley* does not prevent the suppression of speech so long as its source is a political committee rather than an individual.

Buckley does prevent precisely what appellants, and Section 9012(f), are attempting to do here. This Court in *Buckley* repeatedly noted the strangling effect of Section 608(e)(1) on independent expenditures by individuals and *groups*.[10] There is no indication that the Court's decision in *Buckley* turned on 608(e)(1)'s effect solely on individuals. It could not turn on that distinction, for it makes no constitutional difference whether citizens engage in independent advocacy singly or in groups. Indeed, *Buckley* upheld restrictions on *contributions* precisely *because* alternative avenues of independent expression were available to individuals and *groups*, the Court recognizing that political advocacy could be given its strongest and most effective voice in groups, 424 U.S. at 15, and that interference with the freedom of a group

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[9] Common Cause Brief at 38, n.63 (emphasis in original). If Section 608(e)(1) barred "essentially all expenditures," then Section 9012(f), which contains exactly the same dollar limit on expenditures, must do the same.

[10] Any doubt on this point was surely dispelled by this Court in its recent description of its holding in *Buckley* striking down limitations on campaign expenditures because "they directly restrained the rights of citizens, candidates, and *associations* to engage in protected political speech." *California Medical Ass'n.* v. *Federal Election Commission*, 49 U.S.L.W. _____, (June 26, 1981) (emphasis added).

"is simultaneously an interference with the freedom of its adherents." *Id.* at 22, quoting *Sweezy* v. *New Hampshire,* 354 U.S. at 250; *see First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual.") Whether or not speech is protected and whether it can be regulated depends on the content of that speech and the reasons asserted to justify its regulation. It does not depend on the identity of the speaker.[11]

Moreover, there is no assurance that Section 9012(f) will in fact be applied only to individuals. For contrary to appellants' arguments, the apparent reach of Section 9012(f) extends to individuals and "small groups" of individuals, as well as to larger groups like FCM. The term "political committee" under the Fund Act means any "committee, association, or organization" which makes expenditures for the purpose of influencing an election. 26 U.S.C. §9002(9). The Act does not define the terms "committee," "association," or "organization." Presumably it is this omission which allows appellants the license they have taken to propound their own theories of whose expenditures are restricted by Section 9012(f) and whose are not.

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[11] We contend that FCM, as a political committee, has a right of free speech on issues of public importance, just as individuals have such a right. *See First National Bank of Boston v. Bellotti,* 435 U.S. at 788, n. 26. But we do not base our constitutional challenge to Section 9012(f) soley on the vindication of FCM's First Amendment right of speech. We simply rely on the principle announced in *Bellotti* that the source of speech does not affect its right to constitutional protection.

The Commission has not read the term "political committee" narrowly in other circumstances. The Commission proves that very point for us, for it concedes that it has held a single individual to be a political committee under FECA, notwithstanding that Act's definition of "political committee" as including only a "committee, club, association, or other group of persons. . . ." 2 U.S.C. §431(4)(A). The Commission explains its holding by noting that "the operation described . . . [did] not involve the joint purchase by several individuals (each paying their respective shares of the purchase price directly to the vendor from personal funds) of . . . a message of election advocacy." Commission Brief at 45, n. 66, quoting Advisory Opinion 1980-26, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5577, at 10,713.[12] But whether or not a group is a "political committee" under FECA does not turn on whether a purchaser of election advocacy printing or broadcast services pays the vendor directly, or through another member of a group; it depends on whether the group is one of the entities listed in the definition and whether that group received contributions or made expenditures in excess of the limitation.

The Commission has ignored the plain wording of 2 U.S.C. §431(4)(A) in deciding when a political committee exists under FECA, and has consistently read the term "political committee" in its broadest sense.[13] There

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[12] The Commission is empowered to render advisory opinions in response to a written request concerning the applicability of FECA, the Fund Act and the Presidential Primary Matching Payment Account Act (26 U.S.C. §9031, *et seq.*) 2 U.S.C. §§437d(7) and 437f.

[13] *See, e.g.*, AO 1976-51, 1 Fed. Elec. Camp. Fin. Guide (CCH), ¶ 5215; AO 1979-41, *Id.*, at ¶ 5247. The facts and the Commission's holdings in both cases are set out in FCM's Motion To Dismiss or Affirm, at 19-20.

is no reason to believe that the Commission would be any more mindful of the constitutional right of an individual or group of individuals to express themselves on the merits of a publicly-funded Presidential candidate. Indeed, there is every reason to believe the Commission would not be, for it has made clear that what distinguishes a group whose activities are controlled by Section 9012(f) from one whose activities are not, is whether "the individual participants retain control over their funds." Commission Brief at 45, n. 66. And we have seen that to meet that test, the Commission requires that each participant pay his respective share of a particular expense *directly* to the vendor. AO 1980-126, *supra*. Of such things are the constitutional right of speech and association made, in the Commission's view.

To permit Section 9012(f) to remain the law of the land will subject to possible criminal prosecution every individual who collects money from his next door neighbor to pay for a newspaper advertisement[14] which supports a publicly-funded Presidential candidate; not to mention the onerous reporting and disclosure requirements of the FECA.[15] To leave to the Commission the determination of the applicability of Section 9012(f) to the political activities of individuals and groups is to en-

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[14] It would have to be one of the better neighborhoods, given the cost of modern newspaper and broadcast advertisements. *See Buckley v. Valeo*, 424 U.S. at 20, n. 20. Because of the high cost of such services, it is likely that a large number of individuals would have to "chip in" to pay the cost. If, in the interest of convenience, one of them "passed the hat" and paid for the advertisement from the collected funds, a political committee would be born, since each member did not pay his portion of the cost directly to the vendor.

[15] The Court should not overlook the interplay between the Fund Act and FECA in this case. FECA defines a "political committee" as including "any committee, club, association or other group of

sure that there will be — for all practical purposes — no such activities, except by the wealthy. Small groups[16] of citizens of average means will not be able to afford to engage in independent expenditures on behalf of the candidate of their choice.

Appellants' arguments that groups of individuals may engage in unlimited independent expenditures, but political committees may not, is not the same argument they have made in other cases. In *Republican National Committee* v. *Federal Election Commission, supra*, the constitutionality of the Fund Act was challenged on the ground that it prevented supporters of Presidential candidates from contributing directly to the candidates' campaign. That court held that the Fund Act's restriction on such contributions did not abridge the rights of

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persons. . . ." 2 U.S.C. §431(4)(A), in contrast to the Fund Act's narrower definition of "political committee" as "any committee, association, or organization. . . ." 26 U.S.C. §9002(9). It is possible — indeed, likely, given the Commission's broad view of what constitutes a "political committee" under FECA — that a group of individuals might escape the definition under the Fund Act, and yet be caught by the wider net of FECA. Since FECA limits contributions by individuals to political committees to $5,000 per year, 2 U.S.C. §441a(a)(1)(C), a group of individuals may effectively be limited to total expenditures of $5,000 a piece, since their group activities would likely make them a political committee.

[16] "[T]wo or more individuals, pooling and using their own money, to engage jointly in personal expression . . ." is how Common Cause idealizes such groups. Common Cause Brief at 35. "Informal group[s]," the Commission called them in the Court below and in its Jurisdictional Statement to this Court, *see, e.g.*, Commission Juris. Statement at 19, until it became clear that the formal/informal dichotomy had no basis in First Amendment analysis. Both appellants should admit that the logical extension of their positions is that only wealthy individuals and small groups of such individuals are likely to be able to afford to engage in independent expenditures.

would-be contributors because uncoordinated expenditures was were permitted without limit. 487 F.Supp. at 286. That was precisely the argument advanced by the Commission in that case. There, the Commission argued that "[p]laintiffs are free to contribute money to political committees (other than the candidates' authorized committees) to make unlimited expenditures" in support of the publicly funded candidate of their choice. Brief of the Commission at 48. That is not what the Commission says now. Before this Court, the Commission has reversed itself, arguing that political committees may not engage in unlimited independent expenditures to give voice to the views of their contributors.

Similarly, Common Cause, as *amicus curiae* in *Republican National Committee*, argued that "the supporters of a candidate who has accepted public funding are free to express their support in any way they wish, except by direct or indirect contributions to the candidate himself." Common Cause admitted then as it refuses to admit now, that "under *Buckley*, there is no limit on how much an individual or *group* may spend on these activities." Common Cause Brief at 38-39 (emphasis added). Before the three-judge district court below, Common Cause attempted to explain its prior inconsistent statements on this point by contending that its argument in *Republican National Committee* espousing the right of groups to engage in independent expenditures was not intended to include political committees. Common Cause Opening Brief at 34, n. 37. Common Cause did not explain why that was so, and it is now only wishful thinking on their part. *Buckley* protects the right of individuals and groups to engage in independent expenditures. Appellants knew that in *Republican National Committee* and argued as much. They cannot now argue otherwise.

Appellants' expansive notions of the reach of Section 9012(f) — and their concomitantly narrow view of the First Amendment — would lead this Court effectively to outlaw independent political expression for all but the wealthy. And please recall that it was against the real or imagined influence of wealth that the Fund Act was intended to protect Presidential politics. Yet if appellants' view of Section 9012(f) is adopted by this Court, the wealthy will be alone in the field of independent expenditures in Presidential campaigns. Other than the voices of the candidates themselves, only the voices of those who can afford the high cost of independent advocacy will be heard. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . ." *Buckley* v. *Valeo*, 424 U.S. at 48-49; *see First National Bank of Boston* v. *Bellotti*, 435 U.S. at 791.

In *Buckley*, this Court upheld contribution limitations partly because there was, according to the Court, no indication that such limitations "would have any dramatic adverse effect on the funding of campaign and *political associations*. The overall effect of the Act's contribution ceilings [was] merely to require candidates and *political committees* to raise funds from a greater number of persons. . . ." 424 U.S. at 21-22 (emphasis added). Since *Buckley*, that is what FCM has done, with a degree of success which apparently dismays appellants.[17] Now appellants would have the Court nar-

[17] Both appellants bemoan the growth of independent expenditure groups in general. The Commission, for instance, voices the fear that "the 1984 Presidential election will be awash in expenditures by unauthorized political committees. . . ." Commission Brief at 26. Common Cause declares that five such groups (including appellees) raised $21.5 million during 1979-80, and opines that "they would

row the field of independent expenditures, ending the activities of a long-standing committee like FCM, which has given strong and apparently effective voice over the years to the views of its members on issues of importance to them. Independent expenditures must be — or they must appear to contributors to be — an effective means of self-expression, since groups like appellees have been so successful in raising funds. Moreover, if such groups were not effective, the Commission and Common Cause would not so ardently wish to have them suppressed. The very effectiveness of such groups argues against the constitutionality of efforts, like Section 9012(f), to restrict their activities, since if the avenue of effective independent expenditures through political committees is foreclosed, citizens who cannot afford such expenditures on their own will be consigned to political impotence.

We recognize that a range of individual "grass roots" and volunteer activities would still be available to individuals. But not even appellants seriously suggest that such means of expression would be as effective as the right of thousands of ordinary citizens to pool their small donations to avail themselves of "expensive modes

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raise much more than that between now and the 1984 election if Section 9012(f) is struck down. "Common Cause Brief at 33.

The success of groups like FCM in raising funds for independent expenditures in Presidential campaigns hardly argues for the constitutionality of what is practically a total ban on such expenditures. Rather, it demonstrates that citizens are willing — indeed, eager — to contribute money to independent groups to make themselves heard on issues of importance to them, even though they have no hope or expectation of "buying influence" with a candidate. Although they cannot give directly to the candidate of their choice, they want their voices to be heard — just as contributors to Common Cause want their voices heard.

of communication [which are] indispensable instruments of effective political speech." *Buckley* v. *Valeo*, 424 U.S. at 20.

In short, if appellants have their way, an important and effective means of political self-expression — through independent expenditure groups — will be foreclosed to citizens of average means; and there will be a dramatic adverse effect on the funding of political associations — a means of self-expression which this Court left intact in *Buckley*.

There is no good reason why this should be so. There is no constitutional reason why Section 9012(f) should be allowed to limit the independent speech of a political committee and its members simply because — as appellants argue — that speech is paid for by the committee, with funds collected from its members by the committee. The fact that an expenditure is involved does not make it any the less protected speech.[18]

Whether FCM and the other appellees raise funds by means of direct-mail solicitations should not be constitutionally significant. "Speech likewise is protected . . . even though it may involve a solicitation to purchase or otherwise pay or contribute money." *Virginia State Board of Pharmacy* v. *Virginia Citizens' Consumer Council*, 425 U.S. 748, 761 (1976). Direct-mail solicitation is the only practical way in which groups can raise the funds necessary to speak out effectively on behalf of

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[18] "[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." *Buckley* v. *Valeo*, 424 U.S. at 16; *see Virginia State Board of Pharmacy* v. *Virginia Citizens' Consumer Council*, 425 U.S. 748 (1976). *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

their constituents. Even Common Cause solicits funds by means of mailing lists. Surely, Common Cause would concede that its actions and speech are not any less representative of the views of its donors simply because it has raised its funds through direct-mail solicitations. The same is true of FCM. Indeed, FCM and Common Cause may be alike in another way. Both have been in existence for several years and, during that time, they have built up a list of regular donors whose donations, because they are regularly made, are unquestionably spent to voice the views of those donors.

To avoid the plain holding of *Buckley* that independent expenditures could not be restricted for the reasons advanced in that case, and having advanced no new reasons themselves to justify Section 9012(f)'s restrictions, appellants argue that the donation of money to a group to pay for the members' collective speech is not an expenditure but a contribution. By doing so, appellants focus on the mechanics of the transaction, rather than on its substance. The donation of money to a group is the only effective way in which individuals can make themselves heard in the loud and crowded political arena. It is only by joining with kindred political spirits and pooling their resources that citizens can afford to use the modern — and expensive — modes of communication necessary to make their views heard. That is not a contribution; it is an expenditure by the individual, an expenditure made so that he can see and hear his viewpoint on important political issues broadcast and distributed to others.[19]

[19] Please note what is happening here. By arguing that this is a contribution case, rather than what it plainly is — an expenditure case — appellants are attempting to undo one part of *Buckley* with another. This case is no more a contribution case than *California Medical Association* v. *Federal Election Commission, supra*, which upheld a statute limiting contributions, was an expenditure case, not-

That is what appellants want to stop. They would prefer to have the American public hear only what the candidates want them to hear; to prevent groups which are uncontrolled by and unresponsive to the candidates from raising issues which the candidates might not address; and to prevent such groups from voicing the concerns of their adherents — concerns which might not be addressed in the platforms and programs of the candidates.

The Commission argues that independent speech may be suppressed because it might encourage " 'splintered parties and unrestrained factionalism [that might] do significant damage to the fabric of government.' " Commission Brief at 38, quoting *Storer* v. *Brown*, 415 U.S. 724, 736 (1974). The Commission also expresses some concern about "strong political parties" and "accountability" of those who speak for what they say in the political arena. *Id.* at 39.

FCM represents the views of its members on matters of importance to them, views which surely do not threaten the fabric of government. FCM is not a political party; it is a political committee, although its views and those of its members may offend the political parties and those who run them. The public discussion

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withstanding appellants' contrary argument. In that case, the Court was unpersuaded by appellants' argument that a restriction on contributions by an unincorporated association to a political committee was akin to an expenditure limitation, since both restrictions would restrict the ability of the association to engage in protected speech.

Just as appellants in *California Medical Association* attempted to characterize the restriction at issue there as equivalent to an expenditure limitation, appellants here have tried exactly the opposite tack and would, if successful, effectively undo a major part of the decision in *Buckley* striking down expenditure limitations on individuals and groups.

by FCM and other independent political committees may be contentious and even captious, but that is no justification for suppressing that debate. Public comment on public matters is not always genteel, as this Court has noted in *Rosenblatt* v. *Baer*, 383 U.S. 75, 85 (1966):

> The motivating force for the decision in *New York Times* [v. *Sullivan*] was twofold. We expressed "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, *and* that (such debate) may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. (emphasis in original.)

As for accountability, as a long-standing political committee, FCM is accountable to its donors for its conduct. If a committee's donors are not satisfied that their views are being accurately represented, they will not contribute to that committee and it will cease to exist. There is no higher form of accountability than that.

If an individual's payment, with others, of the cost of such collective "speech" is a contribution rather than an expenditure — and we do not for a moment concede that it is — it is still speech. As such, it can be restricted only after the "closest scrutiny" of the proferred justification for that restriction, and then only if the government "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley* v. *Valeo*, 424 U.S. at 25; *see Cousins* v. *Wigoda*, 419 U.S. at 488.

We turn now to the justifications offered by appellants in support of Section 9012(f)'s limitation on the protected speech at issue here.

D. There Is No Compelling Governmental Interest Which Justifies Section 9012(f)'s Limitation On Political Speech.

Much of the Congressional debate cited by appellants in support of Section 9012(f)'s drastic curtailment of independent advocacy deals with the high cost of modern campaigns for federal office, the need to equalize the resources available to competing candidates for President, and the need to remove from candidates the demeaning and time-consuming necessity of fundraising. This Court in *Buckley* rejected such justifications for limitations on campaign expenditures:

> The interest in equalizing the financial resources of candidates competing for federal office is no more convincing a justification for restricting the scope of federal election campaigns. Given the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support. There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate. . . .
>
> The campaign expenditure ceilings appear to be designed primarily to serve the governmental interests in reducing the allegedly skyrocketing costs of political campaigns. . . . [T]he mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people — individually as citizens and candidates and collectively

> as associations and political committees — who must retain control over the quantity and range of debate on public issues in a political campaign. 424 U.S. at 56-57.

It was also argued in *Buckley* that independent expenditures could be constitutionally limited because, like direct contributions to candidates, they are, or appear to be, corrupting to the political process. The Court rejected that argument, as well:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, §608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse. 424 U.S. at 47.

Whether or not Congress has determined that independent expenditures are to be limited because they may be corrupting,[20] this Court has decided that they may not

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[20] We do not believe that is really what Congress determined. The Congresional debate cited by appellants relates either to the Fund Act and the means of funding it, *see, e.g.*, 117 Cong. Rec. 41,780 (1971) (remarks of Sens. Cranston and Hart) or to broader substitute language for what is now Section 9012(f), 117 Cong. Rec. 42,397 (1971) (remarks of Sen. Taft), which was intended to "prevent the use of political committees as a subterfuge to avoid the expenditure limits of the Fund Act." That is not this case. FCM was not formed and did not operate simply to circumvent the limitations on expenditures by candidates. There is no allegation before this Court that FCM is anything other than an *independent* group, operating beyond the control of the candidates.

be restricted for that reason. In any event, Congress' wish is not necessarily this Court's command.

To avoid the holding of *Buckley*, both appellants argue that it is not the givers but the collectors of contributions who now pose a threat to the electoral process, by virtue of their power to amass great wealth for the purpose of attempting to influence the outcome of a Presidential election. Such wealth is made all the more sinister, according to appellants, by the fact that these "collectors" are "party and political professionals," Commission Brief at 25, and "[p]rofessional political managers." Common Cause Brief at 8.[21]

It is constitutionally insignificant how much money is collected and spent, or the political pedigree of those

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The Congressional debate on the Fund Act makes clear the Senate's dislike of fund-raising and the high cost of political campaigns. But those concerns do not justify Section 9012(f)'s strangulation of independent expenditures. The debate is not at all clear on whether Congress thought a restriction on *independent* expenditures was appropriate.

[21] Common Cause's Brief is heavily larded with the suggestion that appellees were acting in league with the Reagan campaign, by virtue of having read newspaper accounts of the Reagan campaign, because some of them (but not FCM) were managed by men who occupied positions within certain of Mr. Reagan's authorized committees, and because all appellees were run by men with professional political experience.

What is the "evil" complained of here: The expertise of the "collectors"? Their political leanings? Could a single political professional — or a "small group" of such individuals — safely make independent expenditures without running afoul of Section 9012(f)? What if they read about the Reagan campaign in the newspaper and tailored their spending strategy accordingly? Could a group of political novices conduct an independent expenditure campaign if they followed the progress of the official campaign in the press and on television?

who spend it. So long as the expenditures are made independently of the candidate and his campaign, the fact of that independence "not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley* v. *Valeo*, 424 U.S. at 47.

In fact, it would seem more objectionable if a wealthy individual, or a "small group" of such individuals spent a large sum of money in independent expenditures. Surely their motives would be more suspect than those of the many givers of small amounts or the managers of political committees like FCM who raise and spend such amounts.

FCM, or its predecessor, has been in operation since 1972. Its managers, those who work to raise and spend money on behalf of issues and candidates, do so because they believe in what they are doing, not because they expect to gain special favors with the White House. Moreover, people do not give money to help candidates whom they do not already support. If FCM has been successful in raising money to spend on behalf of Mr. Reagan, it is because FCM's donors wanted to support Mr. Reagan in the most effective way available to them. That does not make Mr. Reagan "beholden" to FCM. Rather, his popularity made it possible for FCM to raise funds. Just as "the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support . . ." *Buckley* v. *Valeo*, 424 U.S. at 56, so also will the desire of individuals to engage in independent expenditures and the ability of groups like FCM to raise funds to express the views of its members.

The court below in this case said it best:

> Politics is, after all, the unifying theme among members of political committees; their associational tie is the desire to affirm publicly their political viewpoint held in common. *The organizers of political commitees really only mobilize existing political sentiment looking for an outlet — the small size of contributions freely given by diverse contributors expecting no personal glory or prospects of hobnobbing with celebrities attests to that.* Commission Appendix To Juris. Statement A at 26a-27a. (emphasis added).

Thus, the ability of FCM and groups like it to influence the electoral process is not disproportionate to their public support; rather, it is a product of the willingness of thousands of ordinary citizens who have pooled their resources to make themselves heard.

Independent expenditures do not subvert the purpose of the Fund Act. They are a prerequisite to political speech engaged in by those unconnected with the candidate or his campaign. If they are not independent, those expenditures would violate both the Fund Act and FECA, for such expenditures would be deemed to be contributions to the candidate, as well as excess qualified campaign expenses incurred by that candidate, 2 U.S.C. §441a(a)(7)(B)(i), subjecting both the candidate and his authorized committees to civil and criminal sanctions. 26 U.S.C. §§9007, 9012(a); 2 U.S.C. §437g. Thus, while unnecessary to prevent circumvention of the contribution and expenditure limitations of the Fund Act, Section 9012(f) also severely — and unconstitutionally — restricts independent advocacy, despite its substantially diminished potential for abuse.[22] *Buckley* v. *Valeo,* 424 U.S. at 47.

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[22] The irony of appellants' position is that, if it is adopted by this Court, individuals and political committees will be free to spend without limit on Congressional and Senate elections, but they will not be similarly free to speak out as to candidates for the highest office in the land.

1. Section 9012(f) is underinclusive

Unlike the Fund Act's outright ban on direct or indirect contributions to candidates for President or Vice President who receive federal funding for their campaigns, Section 9012(f) purports to limit the independent expenditures of only "political committees." On its face, Section 9012(f) does not apply to a "broadcaster," "periodical publication," or to certain expenditures of a "501(c)" organization. 26 U.S.C. §9012(f)(2)(A) and (B). There is no compelling interest which warrants depriving FCM and its members of the right to make expenditures, but, which allows the media and organizations registered under Section 501(c) of the Internal Revenue Code to make unlimited expenditures. By exempting potentially massive expenditures by such organizations, the reach of Section 9012(f) is woefully underinclusive and fails to eliminate the danger of corruption and the appearance of corruption. Absolutely no essential difference exists between large expenditures exempted under Section 9012(f)(2) and the expenditures prohibited under Section 9012(f)(1). Each type of expenditure has the same innate character, and thus each poses the same danger as a *quid pro quo* for obtaining improper influence over candidates for elective office (assuming, *arguendo,* that any independent expenditure poses such a danger).

Yet for no discernible reason, one group's expenditures are permitted, while another's are forbidden. The distinction cannot be based on the differences between the constitutional guarantees of a free press and of free speech, for "the press does not have a monopoly on either the First Amendment or the ability to enlighten." *First National Bank of Boston* v. *Bellotti,* 435 U.S. at 782.

Finally, were the Court to adopt the distinction propounded by appellants that would allow unlimited independent expenditures by only individuals and "small groups," and add to that number the many entities exempted under Section 9012(f)(2), the prohibition of Section 9012(f)(1) would become the exception rather than the rule, and would be underinclusive in the extreme. In essence, such a distinction would mean that thousands of groups and the media could expend unlimited amounts independent of a Presidential candidate's campaign, but not FCM and others similarly situated, who speak for their many members. The reach of Section 9012(f) is thus underinclusive and fails to effectuate in any substantial degree the asserted purpose of preventing corruption or the appearance of corruption.

Appellants have offered no principled basis on which to explain who may and who may not engage in independent advocacy under Section 9012(f). They have offered no argument in support of the constitutionality of Section 9012(f) which was not considered and rejected by this Court in *Buckley* in striking down a provision of FECA which would have operated on appellants in this case exactly as Section 9012(f) operates.

Whether reasonable or unreasonable, supportive of one candidate or critical of another, constructive or querulous, the right to engage in independent political debate cannot be abridged for any of the reasons advanced by appellants.

E. Section 9012(f) Is Unconstitutionally Vague

Section 9012(f) forbids expenditures in excess of $1,000 which meet the definition of a "qualified campaign expense" if those expenditures "further" the election of a candidate. A "qualified campaign expense" is

defined as one which is incurred by the candidate or his authorized committees "to further" his election or the election of his running mate. 26 U.S.C. §9002(11). Nowhere are the words "to further" defined.

Almost any act of political self-expression can "further" a candidate's election. A statement against one candidate furthers the election of his opponent. Statements on issues — pro or con — affect elections, and can "further" the election of a candidate. "[T]he distinction between discussion of issues and candidates and advocacy of election may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Buckley* v. *Valeo*, 424 U.S. at 42. Thus, for instance, an advertising program, or even a fund-raising drive, critical of the Panama Canal Treaty, which was supported by Mr. Carter and opposed by Mr. Reagan, could be considered to "further" the election of Mr. Reagan. Section 9012(f) therefore affects not only pro- or anti-candidate groups, but issue groups, as well. And the fact that it applies only to "political committees" does not save it from constitutional infirmity, for, as we have shown, the definition of a "political committee," and hence the applicability of Section 9012(f), is far from certain.

Where, as here, a statute imposes criminal sanctions in an area permeated with First Amendment interests, close scrutiny of the particularity of the statute is required, *Buckley* v. *Valeo,* 424 U.S. at 40-41; *see Smith* v. *Goguen,* 415 U.S. 566, 573 (1974). Narrow specificity is required because vague laws operate to chill expression by "inducing citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Buckley* v. *Valeo,* 424 U.S. at 41,

n.48 (cases quoted omitted). The accepted test is "whether the language [of the statute] affords the 'precision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms.' " *Buckley* v. *Valeo,* 424 U.S. at 41, quoting *NAACP* v. *Button,* 371 U.S. at 438.

In *Buckley,* this Court turned back a challenge to the vagueness of Section 608(e)(1)'s prohibition on expenditures "relative to" a candidate, by finding elsewhere in that provision narrowing language which restricted the broad scope of Section 608(e)(1). There is no such language in Section 9012(f) which limits the broad sweep of its restrictions on independent expenditures which "further" the election of a candidate. The expenditures which are limited by that section are those which would constitute "qualified campaign expenses," which are themselves defined as expenses which "further" the election of a candidate. 26 U.S.C. §9002(11). Thus, even the gloss given Section 9012(f) by other provisions of the Fund Act does not narrow its sweep to avoid restrictions on all manner of undefined speech which *might* "further" the election of a candidate.

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Buckley* v. *Valeo,* 424 U.S. at 41, n.48, quoting *NAACP* v. *Button,* 371 U.S. at 433. Section 9012(f) crowds First Amendment freedoms without informing those who may wish to exercise those freedoms just how far they may go. Accordingly, it is unconstitutionally vague and should be struck down as such by this Court.

CONCLUSION

For the foregoing reasons, this Court should uphold the decision of the court below and declare Section 9012(f) unconstitutional on its face.

Respectfully submitted,

J. CURTIS HERGE
ROBERT R. SPARKS, JR.
Counsel of Record

SEDAM & HERGE, P.C.
7600 Old Springhouse Road
McLean, Virginia 22102
(703) 821-1000

Attorneys for Appellee, Fund For a Conservative Majority

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In the Supreme Court of the United States

OCTOBER TERM, 1980

COMMON CAUSE, ET AL., APPELLANTS,

v.

HARRISON SCHMITT, ET AL., APPELLEES,

and

FEDERAL ELECTION COMMISSION,
INTERVENOR-APPELLEE.

BRIEF FOR INTERVENOR-APPELLEE FEDERAL ELECTION COMMISSION

CHARLES N. STEELE *
General Counsel
KATHLEEN IMIG PERKINS
Assistant General Counsel
JEFFREY H. BOWMAN
MIRIAM AGUIAR
SONDRA L. MILLS
Attorneys
FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4143

* Counsel of Record

June 23, 1981

QUESTION PRESENTED

Whether review by this Court is unavailable under 28 U.S.C. §§ 1252, 1253 or 26 U.S.C. § 9011(b) where the district court dismissed appellants' cause of action as moot without addressing any substantive constitutional issues, and where the district court expressly declined to hold that appellants had the capacity to bring their cause of action pursuant to 26 U.S.C. § 9011(b) and Article III of the Constitution of the United States.

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* Other parties to this action are Americans for Change, Americans for an Effective Presidency, Fund for a Conservative Majority, Carl T. Curtis, Winifred Long and David Cohen. This action was consolidated with *Federal Election Commission* v. *Americans for Change, et al.*, No. 80-1067. *See* Joint Appendix at 18.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-847

COMMON CAUSE, ET AL., APPELLANTS,

v.

HARRISON SCHMITT, ET AL., APPELLEES,

and

FEDERAL ELECTION COMMISSION,
INTERVENOR-APPELLEE.

BRIEF FOR INTERVENOR-APPELLEE FEDERAL ELECTION COMMISSION

OPINION BELOW

The opinion of the district court is not yet officially reported but appears at Appendix A of Common Cause's Jurisdictional Statement in No. 80-847 at 1a-33a ("C.C. J.S. in No. 80-847 at ——"), and Appendix A of the Federal Election Commission's Jurisdictional Statement in No. 80-1067 at 1a-34a. ("FEC J.S. in No. 80-1067 at ——").

JURISDICTION

Appellants assert jurisdiction pursuant to 26 U.S.C. § 9011(b) and 28 U.S.C. §§ 1252 and 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article III, Section 2, Clause 1 of the Constitution of the United States and the construction and application of 26 U.S.C. § 9011(b) and 28 U.S.C. §§ 1252, 1253, set forth in the Appendix ("App."), *infra.*

STATEMENT OF THE CASE

By way of this appeal, Common Cause, Winifred Long and David Cohen (collectively referred to as "Common Cause") ask this Court to review a decision rendered by the United States District Court for the District of Columbia (three-judge court) in *Federal Election Commission* v. *Americans for Change, et al.*, No. 80-1067, an action brought by the Federal Election Commission [1] seeking construction of 26 U.S.C. § 9012(f) as applicable to defendants. Common Cause was not a party to the Commission's action and its motion to intervene as a party-plaintiff pursuant to Fed. R. Civ. P. 24(a), (b) was denied by the district court.[2]

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[1] The Federal Election Commission ("FEC" or "Commission") is the independent agency of the United States government vested with the authority to litigate questions involving the construction, implementation and validity of the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013 ("Fund Act"), as well as the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455 ("FECA"), and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042. The Commission is also vested with exclusive jurisdiction with respect to civil enforcement of these laws. *See* 2 U.S.C. §§ 437c(b)(1), 437d(a)(6), 437d(e); 26 U.S.C. §§ 9005(a), 9007(a) and (b), 9010(c), 9011(b), 9036(a) and (b), 9040(b), (c) and (d).

[2] The Commission had opposed intervention by Common Cause on the grounds that 26 U.S.C. § 9011(b) is limited to actions brought by the "Commission, the national committee

The proceedings below may be summarized briefly.[3] Common Cause brought suit pursuant to 26 U.S.C. § 9011(b) and 28 U.S.C. § 1331 seeking a declaration that Americans for Change ("AFC"), its Chairman and its Treasurer were in violation of various provisions of the Fund Act.[4] Count I of the complaint alleged that AFC's expenditures to further the election of Ronald Reagan exceeded $1,000 in violation of 26 U.S.C. § 9012(f)(1). Count II alleged that AFC's expenditures would be "conducted in tandem with and parallel to the official Reagan campaign" and would therefore constitute unlawful contributions to the Reagan campaign pursuant to 26 U.S.C. §§ 9002(11), 9003(b)(1)-(2), 9012(a)(1) and 9012 (b)(1). Common Cause asked that the court issue an injunction barring the activities alleged in both counts of the complaint and that a three-judge court be convened pursuant to 26 U.S.C. § 9011(b)(2). The Commission intervened as a party defendant in *Common Cause* v. *Schmitt* and moved to dismiss on the ground that the three-judge court lacked jurisdic-

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of any political party, and individuals eligible to vote . . . ."; that Common Cause lacked a legally protectable interest in the Commission's action; and that such intervention would be inconsistent with the Commission's exclusive enforcement jurisdiction. *See* note 1, *supra*. Common Cause has not appealed the district court's dismissal of the motion to intervene. *See also Republican National Committee* v. *Federal Election Commission*, 461 F. Supp. 570, 577 (S.D.N.Y. 1978) (motion of Common Cause to intervene denied).

[3] *See also* FEC J.S. in No. 80-1067 at 5-7; FEC brief in No. 80-1067 at 2-5.

[4] *See* C.C. J.S. in No. 80-847, App. I at 69-84a. *Cf. Hunt* v. *Washington Apple Advertising Commission*, 432 U.S. 333 (1977) and note 23 *infra*.

tion over the subject matter of the *Common Cause* complaint.

Federal Election Commission v. *Americans for Change, et al.* is an entirely separate action instituted by the Commission pursuant to 26 U.S.C. §§ 9011 (b) and 9010(c) against AFC, Americans for an Effective Presidency ("AEP") and Fund for a Conservative Majority ("FCM") seeking construction of 26 U.S.C. § 9012(f)(1) as applicable to certain expenditures by defendants. A three-judge court was convened pursuant to 26 U.S.C. § 9011(b)(2), and the Commission, AFC, AEP and FCM moved for summary judgment. On August 19, 1980, the three-judge court heard oral argument on the scope and constitutionality of § 9012(f); on August 28, 1980, the court issued two expedited Orders disposing of *Federal Election Commission* v. *Americans for Change* and *Common Cause* v. *Schmitt*; and on September 24, 1980, the court, *sua sponte*, ordered the cases consolidated.

The court set forth its reasoning for its Orders of August 28 in an opinion dated September 30, 1980. In deciding *Federal Election Commission* v. *Americans for Change*, the court held 26 U.S.C. § 9012(f) unconstitutional under the first amendment. In disposing of *Common Cause* v. *Schmitt*, the court dismissed Count I as mooted by its decision in *Federal Election Commission* v. *Americans for Change, et al.*, and dismissed Count II as an impermissible attempt by private plaintiffs to enforce the Fund Act in direct contravention of the Commission's exclusive enforcement jurisdiction. FEC J.S. in No. 80-1067, App. A at 28a-32a.[5]

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[5] The Court expressed "no opinion whether Common Cause possessed the requisite Article III characteristics to press

On September 26, 1980, Common Cause filed a notice of appeal to this Court in *Common Cause* v. *Schmitt*. In its Jurisdictional Statement, Common Cause expressly declined to appeal the court's dismissal of Count II. C.C. J.S. in No. 80-847 at 10 n.15. Nor has Common Cause appealed from the district court's dismissal of Count I as moot. Rather, asserting jurisdiction pursuant to 26 U.S.C. § 9011 (b) and 28 U.S.C. §§ 1252, 1253, Common Cause asked this Court to review the correctness of the district court's ruling on the constitutionality of 26 U.S.C. § 9012(f) in *Federal Election Commission* v. *Americans for Change*, No. 80-1067.[6]

On October 8, 1980, the Commission filed its notice of appeal to this Court in *Federal Election Commission* v. *Americans for Change*. In its Jurisdictional Statement, the Commission sought review of the district court's holding that § 9012(f) is facially unconstitutional under the first amendment. On February 23, 1981, this Court noted probable jurisdiction in both cases and ordered the cases consolidated for oral argument.

Count I of its lawsuit" before the three-judge court. FEC J.S. in No. 80-1067, App. A at 28a. The court did, however, indicate that the right of Common Cause to bring an action pursuant to 26 U.S.C. § 9011(b) to "implement or construe" the Fund Act is "equivocal." FEC J.S. in No. 80-1067, App. A at 5a.

[6] As a "threshold question," Common Cause also asked this Court to consider whether it should summarily reverse the decision below and remand the case for further factual development.

SUMMARY OF ARGUMENT

Common Cause presently seeks to invoke the appellate jurisdiction of this Court pursuant to 28 U.S.C. §§ 1252, 1253 and 26 U.S.C. § 9011(b) to review the constitutionality of 26 U.S.C. § 9012(f) despite the fact that the court below did not hold § 9012(f) unconstitutional in *Common Cause* v. *Schmitt*. The Commission respectfully submits that none of these jurisdictional provisions may be deemed to confer upon Common Cause a right to appeal the district court's judgment in *Federal Election Commission* v. *Americans for Change*. Accordingly, this Court is without appellate jurisdiction to decide the question presented in *Common Cause* v. *Schmitt*.

Moreover, the Commission respectfully submits that the district court correctly declined to rule on the difficult jurisdictional questions presented by Common Cause's attempt to invoke 26 U.S.C. § 9011 (b) as a jurisdictional base where such a ruling was unnecessary because of the substantive ruling in *Federal Election Commission* v. *Americans for Change*. Thus, because the Commission has properly appealed from the district court's decision and has presented the issue of the constitutionality of 26 U.S.C. § 9012(f) for this Court's review in *Federal Election Commission* v. *Americans for Change*, this Court need not address the jurisdictional deficiencies inherent in the appeal of *Common Cause* v. *Schmitt*. However, should this Court wish to address the jurisdictional question, the Commission submits that this Court must conclude that it lacks subject matter jurisdiction over the Common Cause suit pursuant to 26 U.S.C. § 9011(b) and Article III of the Constitution of the United States.

ARGUMENT

NEITHER 28 U.S.C. §§ 1252, 1253, NOR 26 U.S.C. § 9011(b) PROVIDE A JURISDICTIONAL BASE FOR THIS COURT TO REVIEW *COMMON CAUSE* v. *SCHMITT*.

A. Common Cause May Not Rely On the General Jurisdictional Provisions of Title 28 Where Congress Has Enacted 26 U.S.C. § 9011(b) as a Specific Mechanism for the Implementation and Construction of the Fund Act by Federal Courts.

The complaint in *Common Cause* v. *Schmitt* asserted jurisdiction under 28 U.S.C. § 1331[7] as well as 26 U.S.C. § 9011(b). Appellants now seek to invoke this Court's appellate jurisdiction pursuant to §§ 1252 and 1253 of Title 28. Where, however, Congress has provided specific mechanisms for the extension of federal court jurisdiction, plaintiffs may not bypass such mechanisms and ground jurisdiction over their suit on 28 U.S.C. § 1331 and, on appeal, on 28 U.S.C. §§ 1252 and 1253. Special statutory schemes, such as provided by 26 U.S.C. § 9011(b), are the exclusive avenues for review by federal courts and preclude consideration of such claims pursuant to the general jurisdictional statutes of Title 28.[8] *Brown* v. *General Services Administration*, 425 U.S. 820, 834 (1976); *American Power & Light Co.* v. *Securities and Exchange Commission*, 325 U.S. 385, 389 (1945). *See also Ewing* v. *Mytinger & Cassel-*

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[7] The three-judge court noted that, "whether a single judge district court would have jurisdiction under 28 U.S.C. § 1331 (1976) (federal question jurisdiction) is not before this court." FEC J.S. in No. 80-1067, App. A at 29a n.47.

[8] For reasons stated *infra* at 12-16, neither may *Common Cause* invoke a federal court's jurisdiction pursuant to 26 U.S.C. § 9011(b).

berry, 339 U.S. 594 (1950); *United States* v. *Babcock*, 250 U.S. 328 (1919); *Grutka* v. *Barbour*, 549 F.2d 5, 7 (7th Cir. 1977) *cert. denied*, 431 U.S. 908 (1977); *Atlantic & Gulf Stevedores, Inc.* v. *Donovan*, 274 F.2d 794, 798 n.11 (5th Cir. 1960).

The exclusivity of 26 U.S.C. § 9011(b) as a judicial procedure for review of actions "as may be appropriate to implement or construe" the Fund Act is reinforced by the legislative history accompanying § 9011(b) and by the 1974 FECA amendments which vested exclusive enforcement jurisdiction in the Commission. *See* discussion *infra* at 14-16. Congress clearly intended that § 9011(b) provide limited jurisdiction for federal courts to consider certain kinds of questions in suits brought by specific classes of plaintiffs. To permit Common Cause to invoke the general jurisdictional provisions of Title 28 in an action raising a question properly brought under § 9011(b) or one which should properly have been presented in the first instance to the Commission would subvert the intent of Congress underlying the enactment of 26 U.S.C. § 9011(b) and 2 U.S.C. § 437g.[9]

B. Common Cause's Appeal Pursuant to 28 U.S.C. §§ 1252, 1253 Is, In Any Event, Inappropriate Because No Substantive Constitutional Issues Were Decided in *Common Cause* v. *Schmitt*.

By its very terms, 28 U.S.C. § 1252 limits this Court's appellate jurisdiction to the review of federal court judgments which have invalidated an Act of Congress on constitutional grounds.[10] Since the dis-

[9] Appellants' failure to meet the Article III requirements of standing would, in any event, preclude jurisdiction under Title 28. *See* discussion, *infra* at 16-19.

[10] *See* App. at 2a for the complete text of 28 U.S.C. § 1252.

trict court did not hold an Act of Congress unconstitutional in *Common Cause* v. *Schmitt*, but merely dismissed the case as moot, 28 U.S.C. § 1252 is not an appropriate basis for the exercise of this Court's appellate jurisdiction in *Common Cause* v. *Schmitt*, No. 80-847.[11]

While this Court has held that an appeal under § 1252 brings before the Court not only the constitutional questions but threshold issues of subject matter

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[11] While the lower court could have held § 9012(f) unconstitutional in *Common Cause* v. *Schmitt* based on its decision and opinion in *Federal Election Commission* v. *Americans for Change*, the court very carefully avoided reaching any decision as to Count I in *Common Cause* v. *Schmitt* so as to avoid an unnecessary ruling on the jurisdictional questions presented therein. Indeed, in two recent opinions in cases which raised "identical issues," the court decided the second case based on reasons stated in its earlier opinion. *See Federal Election Commission* v. *Machinists Non-Partisan Political League*, No. 80-1136 (D.C. Cir. May 19, 1981) and *Federal Election Commission* v. *Citizens for Democratic Alternatives in 1980*, No. 80-1256 (D.C. Cir. May 19, 1981) (abbreviated opinion). *See* Rule 13(c) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit. And, in *Martin Tractor Co.* v. *Federal Election Commission, National Chamber Alliance for Politics* v. *Federal Election Commission*, 627 F.2d 375 (D.C. Cir. 1980), *cert. denied, National Chamber Alliance for Politics* v. *Federal Election Commission*, —— U.S. ——, 101 S.Ct. 360 (1980), the court, noting that the consolidated cases raised "nearly identical" issues, rested its decision to affirm the district court's dismissal of *National Chamber* on reasons set forth in its opinion in *Martin Tractor*. In *Common Cause* v. *Schmitt*, however, the court dismissed "Count I of Common Cause's action *as mooted* pursuant to our decision in the FEC action . . ." thus allowing the court to "express no opinion whether Common Cause possessed the requisite Article III characteristics to press Count I of its lawsuit. . . ." FEC J.S. in No. 80-1067 at 28a (emphasis added).

jurisdiction as well,[12] the literal terms and the underlying policies of § 1252 require that this Court decline to exercise jurisdiction in this case:

> The language of [§ 1252] sufficiently demonstrates its purpose: to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality.

McLucas v. *DeChamplain*, *supra* at 31. Since the district court held 26 U.S.C. § 9012(f) unconstitutional in *Federal Election Commission* v. *Americans for Change*, and since the Commission has properly appealed from that decision to this Court, there is no risk that the Commission or any other agency of the United States will be bound by a holding of unconstitutionality without having had the opportunity to obtain this Court's immediate review. Thus, even the threshold question of subject matter jurisdiction in *Common Cause* v. *Schmitt* is not properly before this Court under § 1252.

Invocation of the Court's appellate jurisdiction under 28 U.S.C. § 1253 is also unavailable to appellants.[13] A direct appeal pursuant to 26 U.S.C. § 1253 will lie only where a three-judge court entertains the constitutional issues presented in a claim, decides the action on constitutional grounds alone, and grants or denies an injunction. *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90 (1974). Indeed, in *MTM, Inc.* v. *Baxley*, 420 U.S. 799 (1975), this Court made clear that,

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[12] *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975); *United States* v. *American Friends Service Committee*, 419 U.S. 7, 12 n.7 (1974).

[13] *See* App. at 2a for the complete text of 28 U.S.C. § 1253.

> . . . an appeal will lie to this Court under § 1253 from the order of a three-judge court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below.

Id. at 804.[14] In *Common Cause* v. *Schmitt*, the plaintiffs alleged in Count I of their amended complaint that AFC, AEP and FCM intended to violate 26 U.S.C. § 9012(f) and sought an injunction barring defendants' alleged violations of the Fund Act. The three-judge court did not enter an order granting or denying the injunction but simply dismissed Count I of the complaint as moot.[15] Accordingly, prior decisions of this Court prevent Common Cause from invoking the Court's appellate jurisdiction under 28 U.S.C. § 1253 to review the constitutionality of § 9012 (f).[16]

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[14] In both *Gonzalez* and *MTM* this Court held that an appeal was appropriate initially to the court of appeals. *See also Valentino* v. *Howlett*, 528 F.2d 975 (7th Cir. 1976) (dismissal by a three-judge court on grounds of mootness was properly reviewed by the court of appeals); *Mendez* v. *Heller*, 530 F.2d 457 (2nd Cir. 1976) (appeal from dismissal for want of a justiciable controversy is properly heard by the court of appeals).

[15] Dismissal as moot was proper since the district court's ruling in *Federal Election Commission* v. *Americans for Change* left no live controversy remaining in *Common Cause* v. *Schmitt*. *Rosado* v. *Wyman*, 437 F.2d 619, 625 (2nd Cir. 1970), *aff'd mem.*, 402 U.S. 991 (1971); 6A Moore, Federal Practice, ¶ 57.13 at 57.138 (2d ed. 1979).

[16] As discussed, *supra*, the three-judge court never decided whether it had subject matter jurisdiction over Count I of *Common Cause* v. *Schmitt* and, accordingly, had no occasion to consider whether it was properly convened to hear Count I. If the three-judge court was without subject matter juris-

C. Appellants in *Common Cause* v. *Schmitt* May Not Invoke This Court's Jurisdiction Pursuant to 26 U.S.C. § 9011(b) Because Count I, Like Count II of *Common Cause* v. *Schmitt* Is an Impermissible Attempt by Private Plaintiffs to Enforce The Fund Act.

Common Cause also relied on 26 U.S.C. § 9011(b) as a basis for the three-judge district court's jurisdiction to hear and decide *Common Cause* v. *Schmitt*,[17] and now relies on this same provision to invoke the jurisdiction of this Court on appeal. However, § 9011 (b) cannot be construed as conferring either appellate or subject matter jurisdiction over the appeal taken in *Common Cause* v. *Schmitt*.[18]

Even if appellants in *Common Cause* v. *Schmitt* may appeal to this Court the district court's ruling in *Federal Election Commission* v. *Americans for Change* that 26 U.S.C. § 9012(f) is unconstitutional, this Court must consider whether it pos-

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diction over Count I, this Court would similarly be without jurisdiction over the instant appeal. *See* discussion, *infra* at 12-19.

[17] *See* App. at 1a for the full text of 26 U.S.C. § 9011(b).

[18] While this Court has not yet construed the scope of its appellate jurisdiction under § 9011(b)(2), the Commission submits that at a minimum the question which an appellant presents for review must actually have been decided against the appellant by the court below. *See Buckley* v. *Valeo*, 424 U.S. 1, 9, 10 n.6 (1976). To permit Common Cause to appeal from a decision rendered in a case to which it was not a party would contravene the most fundamental concepts of appellate review. In view of the fact that this Court has noted probable jurisdiction to review the constitutionality of 26 U.S.C. § 9012(f) in *Federal Election Commission* v. *Americans for Change*, the Commission respectfully submits that this Court should properly decide the constitutionality of § 9012(f) in *Federal Election Commission* v. *Americans for Change* and remand *Common Cause* v. *Schmitt* to the district court for

sesses subject matter jurisdiction over *Common Cause* v. *Schmitt* pursuant to 26 U.S.C. § 9011(b) prior to deciding any substantive issues therein. The Commission submits that this Court lacks subject matter jurisdiction over *Common Cause* v. *Schmitt* because Count I, like Count II, is outside the jurisdiction conferred by 26 U.S.C. § 9011(b). Rather, Count I represents an attempt by private plaintiffs to enforce the Fund Act, in direct violation of the Commission's exclusive enforcement jurisdiction. FEC J.S. in No. 80-1067, App. A at 28a, 31a, 32a. *See also* note 21, *infra* and cases cited therein.

The district court properly found it unnecessary to decide whether Common Cause could press Count I of its lawsuit.[19] However, the court's analysis in dismissing Count II compels the same result with respect to Count I. As the court observed: "Congress has legislated in no uncertain terms with respect to FEC dominion over the election law." FEC J.S. in No. 80-1067, App. A at 31a; 2 U.S.C. § 437c(b)(1). Actions to enforce provisions of FECA, the Fund Act

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determinations as to whether that case remains moot or whether it presents a justiciable controversy. Such a disposition would enable the district court to consider more fully the threshold issue of subject matter jurisdiction over Count I of *Common Cause* v. *Schmitt*.

[19] 26 U.S.C. § 9011(b)(2) required the district court to render its decision construing 26 U.S.C. § 9012(f) as expeditiously as possible. In view of the magnitude of the constitutional questions involved in construing § 9012(f), the district court properly confined its resolution of these issues to its disposition of *Federal Election Commission* v. *Americans for Change*, and properly declined to address the jurisdictional ambiguities inherent in Count I of *Common Cause* v. *Schmitt* where it was unnecessary to do so. *Cf. O'Brien* v. *Brown*, 409 U.S. 1 (1972).

or the Primary Matching Payment Account Act—actions like both Count I and Count II of the Common Cause complaint—must be first processed through and acted upon by the Commission.[20] Private rights of enforcement will not be lightly construed in a statute but are found only where Congress has clearly manifested such an intention. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979).

Moreover, this Court has already concluded that Congress did not create a private right of action for enforcement of the Federal Election Campaign Act. *Cort* v. *Ash*, 422 U.S. 66, 77 (1975).[21] Similarly,

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[20] *See* 2 U.S.C. § 437g for the detailed enforcement procedures enacted by Congress for the processing of complaints brought to the Commission. *See also* H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 4 (1976), adopted at H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 35 (1976); 122 Cong. Rec. 12,199 (1976) (remarks of Rep. Hays).

[21] This Court relied on Congress's creation of the Federal Election Commission in 1974 as support for the conclusion that Congress intended no private right of action in the 1971 Act. *Cort* v. *Ash*, 422 U.S. at 74-76. Subsequent court decisions have reaffirmed that conclusion. In *Gabauer* v. *Woodcock*, 594 F.2d 662, 673 (8th Cir. 1979) the court concluded that the same result was clear under the 1976 FECA Amendments. The 1976 FECA Amendments made clear that the enforcement scheme of 2 U.S.C. § 437g applied to alleged violations of not only Title 2, but of Chapters 95 and 96 of Title 26, as well. The court also specifically noted that it would not permit circumvention of that enforcement scheme "under the guise of a parallel cause of action". *Id.* at 673. *See also In re Carter-Mondale Reelection Committee, Inc.* v. *Federal Election Commission*, 642 F.2d 538 (D.C. Cir. 1980); *Durkin* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide

§ 9011(b) affords no private right of enforcement. Rather, Congress sought by the enactment of § 9011 (b) to extend federal court jurisdiction to hear and decide, on an expedited basis, questions of the proper construction of the Fund Act so that public financing for presidential or vice-presidential candidates would not interfere with the normal operation of presidential campaigns. S. Conf. Rep. No. 92-553, 92d Cong., 1st Sess. 53-54 (1971); 117 Cong. Rec. 45,855, 45,857 (1971). *See also Republican National Committee* v. *Federal Election Commission*, 461 F. Supp. at 576.

Congress did not intend, however, by the use of "implement or construe" in § 9011(b) to create an avenue whereby private parties, like Common Cause, could sue to enforce the Fund Act against other parties.[22] Since the Common Cause complaint asked that the district court enjoin activities of defendant-appellees as violations of the Fund Act, there can be

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(CCH) ¶ 9147 (D.N.H. 1980); *Walther* v. *Federal Election Commission*, 82 F.R.D. 200, 202 (D.D.C. 1979); *Walther* v. *Anderson*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9085 (D. Minn. 1979); *Walther* v. *Biden*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9084 (D. Del. 1979); *In re Federal Election Campaign Act Litigation*, 474 F. Supp. 1044 (D.D.C. 1979); *Walther* v. *Barnett*, 474 F. Supp. 1051 (D.D.C. 1979); *Walther* v. *Baucus*, 467 F. Supp. 93, 94 (D. Mont. 1979); *Common Cause* v. *Federal Election Commission*, 82 F.R.D. 59, 60 (D.D.C. 1979); *Hemenway* v. *Barnard and Federal Election Commission*, No. 73-1426 (D.D.C. Dec. 21, 1978); *Hampton* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9036 (D.D.C. 1977), *aff'd* No. 77-1546 (D.C. Cir. July 21, 1978) (unpublished opinion).

[22] Of course, plaintiffs invoking a federal court's jurisdiction pursuant to 26 U.S.C. § 9011(b) must demonstrate sufficient "injury in fact" in order to present a justiciable case or controversy, a requirement which Common Cause has also failed to satisfy. *See* discussion *infra* at 17-19.

little doubt that Common Cause has attempted to bring an action to enforce the statute.

D. Appellants Lack Standing Pursuant to Article III to Press Count I.

The complaint in *Common Cause* v. *Schmitt* alleged that Cohen and Long were eligible to vote for President of the United States in the 1980 election and that their suit was, therefore, authorized by 26 U.S.C. § 9011(b).[23] Although the district court did not find it necessary to decide whether Common Cause was entitled to press Count I, the court observed that in order to invoke the court's jurisdiction, appellants must satisfy the prerequisites of Article III of the Constitution of the United States.[24]

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[23] Common Cause is not one of the plaintiffs eligible to sue under § 9011(b), being neither the "Commission", nor "the national committee of any political party" nor an "individual eligible to vote for President." Rather, Common Cause sued "on behalf of its members" which allegedly include eligible voters. C.C. J.S. App. I at 69a-74a. However, because the Common Cause complaint failed to state a "distinct and palpable" injury to Common Cause members *as voters*, Common Cause may not invoke federal court jurisdiction under § 9011(b). *Cf. Martin Tractor Co.* v. *Federal Election Commission*, 460 F. Supp. 1017, 1019 (1978), *aff'd on other grounds*, 627 F.2d 375 (D.C. Cir. 1980), *cert. denied*, *supra*. *See* discussion *infra* at 17-19. Because Mr. Cohen, who alleged that he is both an eligible voter and a member of Common Cause, joined with Common Cause in bringing this suit, this Court need not address the issue of Common Cause's standing to bring suit on behalf of its members. *See Hunt* v. *Washington Apple Advertising Commission*, *supra*.

[24] In dismissing Count II of *Common Cause* v. *Schmitt*, the district court stated that "our holding dismissing Count II does not require explicit consideration of the Article III 'case or controversy' requirement. As we find ourselves without subject matter jurisdiction we leave open the question of Common Cause's standing to bring Count II of its complaint." FEC J.S. in No. 80-1067, App. A at 29a n.47.

Article III limits the judicial power of federal courts to actual "cases or controversies." *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). The concept of standing is part of this limitation and an absolute pre-condition to maintaining an action in federal court, *Winpisinger* v. *Watson*, 628 F.2d 133, 137 (D.C. Cir. 1980), *cert. denied*, 446 U.S. 929 (1980), and focuses upon "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth* v. *Seldin*, 422 U.S. at 498. Involving both constitutional and prudential limitations, the standing requirement fixes the role of the courts in a democratic society. *Id.*

To meet these constitutional requirements, the plaintiff must allege "a distinct and palpable injury to himself," *Warth* v. *Seldin*, 422 U.S. at 501; the injury alleged must be objective and concrete, *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974); and "a 'fairly traceable' causal connection between the claimed injury and the challenged conduct" must be asserted. *Duke Power Co.* v. *Carolina Env. Study Group, Inc.*, 438 U.S. 59, 72 (1978).[25] This latter factor requires a showing that there is a " 'substantial likelihood' that the relief requested will redress the injury claimed." *Duke Power Co.* v. *Carolina Env. Study Group, Inc.*, *supra*, 438 U.S. at 75 n.20; *Greater Tampa Chamber of Commerce* v. *Goldschmidt*, 627 F.2d 258, 261 (D.C. Cir. 1980). With regard to prudential considerations, this Court has held that when the claimed harm is a "generalized grievance"

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[25] Compare C.C. J.S. in No. 80-847, App. I at 82a with *Winpisinger* v. *Watson*, 628 F.2d at 139 ("the endless number of diverse factors potentially contributing to the outcome of state presidential primary elections . . . forecloses any reliable conclusion that voter support of a candidate is fairly traceable to any particular event.").

shared in substantially equal measure by all or a large class of citizens, that harm alone does not normally warrant exercise of jurisdiction. *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *Ex parte Levitt*, 302 U.S. 633, 634 (1937); *Frothingham* v. *Mellon*, 262 U.S. 447, 488 (1923). This self-imposed limitation is designed to prevent courts from deciding "abstract questions of wide public significance . . . [where] other governmental institutions may be more competent to address the questions." *Warth* v. *Seldin*, 422 U.S. at 500.

Both the constitutional and prudential aspects of the standing doctrine lead to the conclusion that appellants lack standing to press Count I. Appellants alleged below that the alleged violations of 26 U.S.C. § 9012(f) would injure their right as voters to have the election process free from undue influence.[26] However, such a claim is no more than a generalized interest in the enforcement of the election laws, insufficient to give rise to a justiciable case or controversy. *Sierra Club* v. *Morton*, 405 U.S. 727, 739 (1972) (a mere "interest in a problem" is not sufficient by itself to give rise to a justiciable controversy).[27] Moreover, appellants have not demonstrated that the relief requested—construction of the statute and an injunction against expenditures made by defendant-appellees—would redress the alleged injury to their rights as voters. *Compare Baker* v. *Carr*, 369 U.S. 186, 204-208 (1962); *Daughtrey* v. *Carter*,

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[26] *See* C.C. J.S. in No. 80-847, App. I at 82a.

[27] Congress's enactment of § 9011(b), including as it does appropriate actions brought by eligible voters, may not be read to confer upon appellants "injury in fact." Appellants must still meet the justiciability requirements of Article III. *Buckley* v. *Valeo*, 424 U.S. at 12.

584 F.2d 1050, 1055-57 (D.C. Cir. 1978) with *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. at 223 n.13; *Winpisinger* v. *Watson*, 86 F.R.D. 77, 79 (D.D.C. 1980) ("How other people vote . . . does not in any way relate to plaintiffs' own exercise of the franchise and further does not constitute concrete and specific judicially recognizable injury.") Since the purported injury to appellants as voters rests entirely upon how others voted and other voters' reasons for casting ballots for a particular candidate, appellants do not present a case or controversy sufficient for the invocation of federal court jurisdiction.

CONCLUSION

For the reasons set forth herein, the Commission respectfully submits that this Court is without jurisdiction to consider *Common Cause* v. *Schmitt*.

Respectfully submitted,

CHARLES N. STEELE
General Counsel

KATHLEEN IMIG PERKINS
Assistant General Counsel

JEFFREY H. BOWMAN
MIRIAM AGUIAR
SONDRA L. MILLS
Attorneys

FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4143

June 23, 1981

APPENDIX

26 USC § 9011. Judicial review

(a) *Review of certification, determination, or other action by the Commission.* Any certification, determination, or other action by the Commission made or taken pursuant to the provisions of this chapter shall be subject to review by the United States Court of Appeals for the District of Columbia upon petition filed in such Court by any interested person. Any petition filed pursuant to this section shall be filed within thirty days after the certification, determination, or other action by the Commission for which review is sought.

(b) *Suits to implement chapter.*

(1) The Commission, the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or construe any provisions of this chapter.

(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subsection and shall exercise the same without regard to whether a person asserting rights under provisions of this subsection shall have exhausted any administrative or other remedies that may be provided at law. Such proceedings shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the

hearing and determination thereof, and to cause the case to be in every way expedited.

28 USC § 1252. Direct appeals from decisions invalidating Acts of Congress

Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

28 USC § 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Article III, Section 2, Clause 1 of the Constitution of the United States.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

COMMON CAUSE, *et al.*,
Appellants,
v.
HARRISON SCHMITT, *et al.*,
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FEDERAL ELECTION COMMISSION,
Appellant,
v.
AMERICANS FOR CHANGE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF OF APPELLANTS COMMON CAUSE, DAVID COHEN AND WINIFRED LONG

Of Counsel:
ARCHIBALD COX
KENNETH J. GUIDO, JR.
ELLEN G. BLOCK
DONALD J. SIMON
COMMON CAUSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1200

LOUIS R. COHEN
Counsel of Record
ROGER M. WITTEN
BRUCE E. COOLIDGE
CLIFFORD B. HENDLER
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Attorneys for Appellants Common Cause, David Cohen and Winifred Long

September 29, 1981

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REPLY BRIEF OF APPELLANTS COMMON CAUSE, DAVID COHEN AND WINIFRED LONG

INTRODUCTION

The fundamental error in appellees' argument is their limited vision of the objective of the public financing provisions, including Section 9012(f). The objective is not merely to eliminate the "*quid pro quo*" in the narrowest sense—mid-campaign promises of Presidential favors in return for support—but to fulfill Congress' larger vision, later expressed by Senator Pastore:

> "Let the President be a free and independent man. Let him not be beholden to anyone." 119 Cong. Rec. 38900 (Nov. 30, 1973).

The ideal of an independent Presidency extends to an entire Administration, including the White House staff and the political appointees in executive departments and agencies. These are the decision makers who have always been called upon—in AFC's eloquent phrase—to show "some measure of loyalty" [1] to those whose money helped the candidate win.

The Fund Act offers each major-party presidential candidate the option of freeing his administration from having to show such loyalty. Section 9012(f) makes that option real. Without Section 9012(f), the same people who would be raising contributions for the official campaign committees if the candidate had not accepted public funding would simply form "unauthorized" political committees and, without consultation, raise the same money for the candidate and spend it in the same ways as before. And others seeking to earn "some measure of loyalty" could also form "unauthorized" political committees to raise funds to make large expenditures, which become all the more important in a campaign from which contributions have been excluded. The pressure of—

> They raised and spent two million dollars for our candidate in the last election. Unless we show our loyalty and appreciation, they may not raise and spend it in the next election.

is just about as dangerous as—

> They contributed or raised contributions of two million dollars in the last election. They may not do it in the next unless we show our appreciation.

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[1] Brief of Appellees Harrison H. Schmitt, Carl T. Curtis, and Americans For Change ("AFC Br.") 9, 44.

Section 9012(f) meets this problem by limiting "political committees"—organizations whose primary purpose is to raise money from outsiders and spend it to help their candidate win the election—to expenditures of $1000. The section was added to the Fund Act because Congress refused to ignore reality.

The court below, while denying discovery, decided the case on factual premises that differ sharply from Congress' perception of political reality.[2] We believe the congressional perception has such ample support in experience as to warrant dismissing the challenge to the constitutionality of Section 9012(f) on the present record. If the Court has doubt, however, then we submit that the Court should remand the cases for inquiry into the facts.[3]

ARGUMENT

I. SECTION 9012(f) APPLIES TO "INDEPENDENT EXPENDITURES" BY UNAUTHORIZED POLITICAL COMMITTEES IN SUPPORT OF PRESIDENTIAL CANDIDATES WHO HAVE CHOSEN TO ACCEPT PUBLIC FINANCING.

Appellants AFC and AEP contend that Section 9012(f) applies only to expenditures that "have been requested or authorized" by a publicly financed Presidential candidate.[4] This construction is inconsistent with the language and the logic of the Fund Act, and it is not sup-

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[2] The district court's opinion is now reported at 512 F. Supp. 489.

[3] *See* Brief of Appellants Common Cause, David Cohen and Winifred Long (May 9, 1981) ("CC Br.") 41-44.

[4] AFC Br. 10; Brief of Appellee Americans for an Effective Presidency ("AEP Br.") 10. Appellee Fund for a Conservative Majority concedes that Section 9012(f) applies to all expenditures by political committees. Brief of Appellee Fund for a Conservative Majority ("FCM Br.") 3.

ported by legislative history or by actions of the Federal Election Commission ("Commission").

A. The Plain Language of Section 9012(f) Covers "Independent Expenditures" by Political Committees.

Section 9012(f) makes it unlawful—

> "for any political committee which is not an authorized committee . . . knowingly and willfully to incur expenditures to further the election of [a Presidential candidate who has chosen public financing] . . . in an aggregate amount exceeding $1,000."

As AEP acknowledges,[5] this language "literally" applies to its and AFC's expenditures, even if those expenditures were not requested or authorized by the official campaign. The court below correctly refused to create an exception inconsistent with what it called the "plain terms" of the statute.[6]

Given the clarity of the statutory language, this Court should decline even to consider the web of inferences AFC and AEP seek to weave out of provisions of other statutes, floor-debate remarks wrenched out of context, and post-enactment legislative history. "If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *United States v. Turkette*, 101 S. Ct. 2524, 2527 (1981), *quoting Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see Howe v. Smith*, 101 S. Ct. 2468, 2475 (1981).

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[5] AEP Br. 4.

[6] 512 F. Supp. at 492, C.C. App. 7a.

B. To Serve its Evident Purpose, Section 9012(f) Must Cover "Independent Expenditures" by Political Committees.

Next to its plain language, the most important guide to the construction of a statute is its evident purpose.[7] Section 9012(f), read straightforwardly, forecloses a basic threat to integrity in the conduct of government: the claim to "some measure of loyalty" [8] from the President and his administration to those who (despite his decision to forego private fundraising) have organized a political committee to raise and spend money to help him win the election. Whether the managers of an unauthorized political committee are old friends of the candidate who operate the committee as an uncoordinated offshoot of the official campaign, or would-be friends seeking political credit for raising and spending large sums,[9] Section 9012(f) must cover the committee's expenditures to achieve its evident purpose.

On AFC's and AEP's construction, Section 9012(f) makes no sense. AEP offers no explanation of its purpose. AFC says that it "must be construed as a contribution limit"—*i.e.*, as a $1,000 limit on contributions in the form of coordinated expenditures.[10] But Section

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[7] *See, e.g., Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 165 (1980); *Johnson v. Southern Pacific Co.*, 196 U.S. 1, 14, 16-21 (1904). *See also County of Washington v. Gunther*, 101 S. Ct. 2242, 2252-53 (1981).

[8] AFC Br. 9, 44.

[9] The political action committees formed by labor unions and corporations are good examples. Currently, the PACs make contributions to candidates for the Senate and House of Representatives, but without Section 9012(f) they could as easily spend their enormous sums in a publicly-financed presidential campaign. In 1980, PACs contributed $55.3 million to congressional candidates. Federal Election Commission, FEC Issues Final Summary Data on PAC Giving (Press Release, Aug. 4, 1981).

[10] AFC Br. 13.

9012(b) bars acceptance of any contributions by a publicly financed Presidential candidate. To suppose that subsection (f) serves the purpose of putting a $1,000 limit on what subsection (b) has forbidden is absurd.

AFC replies that the word "contribution," as used in 1971 in Section 9012(b), must not have included coordinated expenditures.[11] There is no support for that supposition. When this Court in *Buckley* construed the term "contribution" to include "expenditures placed in cooperation with or with the consent of a candidate," *Buckley v. Valeo*, 424 U.S. 1, 46-47 n.53 (1976), it was following what it understood was the congressional intent. In 1976, Congress codified the Court's elaboration, *see* 2 U.S.C. § 441a(a)(7)(B)(i) (1976), giving no indication that it thought it was changing the meaning of the term.[12]

C. The Legislative History of the Fund Act Supports the Plain Meaning of Section 9012(f).

The legislative history of the Fund Act reveals no intention to carve out an exception from Section 9012(f) for independent expenditures. The committee report and

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[11] *Id.*

[12] AFC and AEP also argue that Section 9012(f) could not have been intended to cover independent expenditures because they were covered by the 1971 FECA. AFC Br. 14-17; AEP Br. 11, 14. But any overlap is at best partial: the 1971 FECA, when adopted, applied to all federal candidates, and to all spenders (including individuals), but to only some kinds of expenditures to further a candidate's election; Section 9012(f) applies only to expenditures by political committees on behalf of Presidential candidates who have chosen public financing, but within those narrower categories of candidates and spenders it applies to all expenditures to further the candidate's election. A mere partial overlap between provisions of different statutes pales in importance when compared to a flat contradiction between subsections (b) and (f) of the same section. Moreover, the 1971 FECA was not adopted until February 7, 1972, nearly two months after the Fund Act was signed into law.

the debates are consistent with the plain language and evident purpose of Section 9012(f).[18]

The legislative history contains several clear statements of the congressional intention. The Conference Committee Report states that Section 9012(f) makes it unlawful "for any committee which is not an authorized committee, to spend more than $1000 during the general campaign on behalf of the candidacy of the eligible candidates of a party." H.R. Rep. No. 92-708, 92d Cong., 1st Sess. 57 (1971). There is no reference to an exception for "independent" expenditures. Senator Kennedy explained that under the Fund Act—

> "Unauthorized committees supporting candidates who elect public financing are limited to expenditures of $1000." 117 Cong. Rec. 41777 (Nov. 17, 1971).

Senator Dole, in speaking against the Fund Act, said—

> "If that amendment [the Fund Act] passes we will have 'authorized' committees and 'unauthorized committees' . . . . The unauthorized committees could . . . solicit funds and use them for any purpose, provided they did not spend more than $1,000 to elect a President or Vice President." 117 Cong. Rec. 42592 (Nov. 22, 1971).

Senator Goldwater spoke unequivocally to the point at issue:

> "But what is there to stop me from supporting the candidate of my choice by forming a committee without his knowledge . . .? *This bill supposedly tries*

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[18] AFC and AEP are attempting to impeach the plain language of Section 9012(f). "Before a court properly could consider taking such liberty with the statutory language there should be, at least, unmistakable support in the history and structure of the legislation." *Blue Chip Stamps v. Manor Drugstores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

> *to eliminate that . . . .*" 117 Cong. Rec. 41953 (Nov. 18, 1971) (emphasis added).[14]

AFC's brief reprints Senator Goldwater's rhetorical question but omits Senator Goldwater's own immediate and decisive answer (italicized above).[15] AFC then jumps more than a column of dialogue to quote a significantly different question later posed by Senator Goldwater and Senator Pastore's reply:

> "*Mr. Goldwater.* . . . . Suppose [a candidate's] brother buys some time on television and the candidate says, 'I did not know my brother was spending money that way.' There is no way we can prevent that."
>
> * * *
>
> "*Mr. Pastore.* That is covered by S.382 [FECA]. I keep repeating that. What we are trying to do is to characterize this particular bill [the Fund Act] as complementary legislation on campaign expenditures and campaign financing. This is the financing part . . . ." [16]

Senator Pastore's answer—on which AFC relies heavily—was not in response to Senator Goldwater's much earlier question about an unauthorized committee (quoted above and answered by Senator Goldwater himself), but to his much later question about an individual. Senator Pastore's statement that the case of an individual purchasing campaign advertising "is covered by S.382" reflects only his recognition, clear at other points in the debates as well,[17] of the constitutional difference between

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[14] Senator Goldwater went on to voice doubts as to the Fund Act's constitutionality, a view with which we obviously disagree.

[15] AFC Br. 16.

[16] AFC Br. at 16, *quoting* 117 Cong. Rec. 41953 (Nov. 18, 1971).

[17] *See, e.g.*, 117 Cong. Rec. 42398 (Nov. 19, 1971) (remarks of Senators Taft and Pastore).

restrictions on political committees and restrictions on individuals.

AEP makes similarly creative use of scissors, truncating the debate between Senators Taft and Pastore and leaving a misleading impression of what it was about. Contrary to the impression AEP seeks to create, the senators were not debating whether to limit Section 9012(f) to coordinated expenditures but whether to expand Section 9012(f) to cover groups other than political committees.

The debate began at 117 Cong. Rec. 42397, a page earlier than AEP's quotations begin.[18] Senator Taft said, "I concur with the purposes of this section [which became 9012(f)]." He then proposed to expand it to reach organizations that would not be covered by the term "political committee":

> "The language in my amendment would delete the words 'political committee' in line 4 and substitute the words 'any corporation, labor organization, partnership, association, political committee, political education committee or any other committee.'"

He then explained his purpose:

> "In mentioning political committee, as the present . . . bill does, the desire, of course, is to prevent any political committees from being formed as a subterfuge so that they can go out beyond the authorization of the committees and make expenditures that were not within the limitations of the expenditures which are in the bill.[19]

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[18] The statements quoted by AEP appear at 117 Cong. Rec. 42398.

[19] This sentence is not easy reading. It becomes clear, however, if one reads the concluding phrase as referring to "the limitations of expenditures which are in *other parts of* the bill," *i.e.*, Section 9012(a), which limits expenditures by the candidate and his au-

> "My purpose is to apply that same restriction to any other type of organization. I might point out that it does not include an individual. An individual, I believe, should be able to make any kind of expenditure or effort he wants to himself on behalf of a presidential candidate or a party in whom he has confidence and desires to support."

Senator Taft appears to assume that all expenditures by unauthorized political committees are and should be covered by Section 9012(f). His point is that Section 9012(f) should be expanded beyond "political committees" to "any other type of organization."[20] The ensuing debate, quoted at length at pages 12-14 of AEP's brief, was about that ultimately rejected proposal. Thus, when

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thorized committees. Senator Taft read Section 9012(f) to prevent an unauthorized political committee from being used as a subterfuge to get around Section 9012(a).

[20] Senator Taft was seeking chiefly to bring the expenditures of labor unions not prohibited by 18 U.S.C. § 610 (now 2 U.S.C. § 441b (1976)) within the section. Section 9012(f)(2), which now provides an exception for labor unions to communicate with their members, had not yet been added to the bill. Apparently Senator Taft and other Senators were proceeding on the assumption that a labor union is not a "political committee" because its primary purpose is not the election of a candidate or candidates for office. They may well have been making the same assumption about COPE and any other labor union political action committees because the committees claimed their expenditures were for educational advice to members.

AEP contends Senator Taft made statements indicating he doubted that Section 9012(f) would cover AMPAC. AEP Br. 13. But Senator Taft's remarks can more fairly be read to suggest that he believed Section 9012(f) would cover AMPAC and should be expanded to cover other groups as well. *See* 117 Cong. Rec. 42398 (Nov. 19, 1971). Even if AEP's reading were correct, the remarks would shed little light on the proper construction of Section 9012(f), because Senator Taft gave no indication as to why he might have thought that AMPAC was not covered.

Senator Pastore, responding to Senator Taft, argued that the law should not reach "a committee of faculty members say at Columbia University who might get together and buy radio time . . . to broadcast their support," [21] he was arguing against deleting the narrower term "political committee" and replacing it with broader language that would reach groups that do not raise money from outsiders; he was neither assuming nor arguing that Section 9012(f) would limit only coordinated expenditures.[22]

D. The Commission Has Not Construed Section 9012(f) To Exclude "Independent Expenditures" by Political Committees.

The claims of AFC and AEP that prior Commission actions support their position [23] lack foundation. The Commission has not previously spoken on the issue.

Appellees cite the failure of the Commission in 1976 to adopt a proposed regulation that AFC says "tracked the language" of Section 9012(f).[24] Adoption of a regulation tracking the language of Section 9012(f) would have added nothing. The failure to adopt such a regulation subtracts nothing.[25]

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[21] 117 Cong. Rec. 42398 (Nov. 19, 1971).

[22] The Taft Amendment, and both Senators throughout their dialogue, use the term "committee" to include organizations that are not "political committees."

[23] AFC Br. 24-25; AEP Br. 18-20.

[24] AFC Br. 24; *see* AEP Br. 18.

[25] AFC's and AEP's assertion that it was assumed, in the Commission's 1976 hearings, that Section 9012(f) did not apply to independent expenditures, is wrong. For example, Robert Thomson, on behalf of the Democratic Senatorial Campaign Committee, testified as follows:

> "A license for unlimited 'independent' spending would make a farce of . . . the expenditure limitations imposed on Presi-

The two advisory opinions AEP cites have no bearing on the question.[26] In "GOP Feminist Caucus," the organization requesting the opinion stated it intended to spend less than $1,000, the Commission expressed doubt whether the group was a "political committee," and it

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dential candidates that accept payments under Chapter 95 of the Internal Revenue Code....

"In fact, the Court [in *Buckley*] specifically found that Subtitle H was constitutional. Consequently, the national committees are prohibited by Section 9012(f) from making independent expenditures in excess of $1000 in the general election, no matter what the proposed regulation eventually says.

* * * *

"Some may claim that Section 9012(f) should not be enforced since the *Buckley* Court overturned similar independent expenditure limits in what formerly was Section 608(e) of Title 18. However, the limitation in Section 9012(f) is more narrowly drawn. It applies only to political committees, whereas Section 608(e) applied to all 'persons.'

"Moreover, it applies only to general election campaigns for President where candidates may receive 100 percent public financing, whereas Section 608(e) applied to all federal elections." Hearings on Part 109 (Independent Expenditures) June 9, 1976, at 275-77.

The Commission's then General Counsel answered a question about what Congress intended: "The way I look at it, they tried to put a $1000 limit on independent political committee expenditures...." (He went on to question the constitutionality of that step in light of *Buckley*.) Hearings on General Election Financing, June 25, 1976, at 39.

Commissioner Springer, worried that the $1,000 represented a loophole, said "[I]t looks to me as if Congress has deliberately left an exception for any group of people to get together and spend up to not exceeding $1000." *Id.* at 89.

[26] AEP Br. 19. The one instance where the Commission was asked for an advisory opinion about Section 9012(f) was AEP's request, but AEP withdrew its request rather than receive the Commission's reply. *See* Letters from Roderick M. Hills to FEC, May 15, 1980, and July 1, 1980.

appears the question arose in the context of spending in the primary rather than the general election.[27] It is no surprise that the Commission did not mention Section 9012(f), which applies only to expenditures over $1,000, only to "political committees," and only in the general election. "Citizens for Carter" [28] is even a weaker reed: it was appropriately limited to the narrow question posed, which concerned the proper form of a disclaimer.

AFC's reliance on Commission regulations explicating the term "qualified campaign expenses" [29] is also misplaced. "Qualified campaign expenses" is defined in the statute as expenses "by the candidate" or "by an authorized committee of the candidate[]." 26 U.S.C. §§ 9002(11)(A)(i)-(iii) (1976). The regulations explicating that term naturally reflect the fact that such "qualified campaign expenses" are by definition not independent.[30] The term in Section 9012(f) with which this case is concerned is the much broader term "expenditures," a term defined in a way that is not limited to coordinated expenditures. *See* 2 U.S.C. § 431(9)(A)(i) (Supp. III 1979).

II. SECTION 9012(f) IS A CONSTITUTIONALLY PERMISSIBLE MEANS OF IMPLEMENTING AN OPTIONAL SYSTEM OF PUBLIC FINANCING.

Appellees' arguments under the First Amendment fall into two categories. First, they argue that Section 9012(f) is unconstitutional as applied to them. Second, they argue that even if Section 9012(f) would be con-

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[27] Informational Letter re: AOR 1976-28, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6062 (Sept. 10, 1976).

[28] AO 1976-35, *id.* ¶ 5206 (Aug. 12, 1976).

[29] AFC Br. 11-12.

[30] The definition of the term "on behalf of" in 11 C.F.R. §§ 110.8(g)(1)-(2) (1981) is too narrow even to reach most coordinated expenditures.

stitutional as applied to their activities, its language is either too vague and broad or too narrow. Both arguments lack merit.

A. Section 9012(f) Does Not Violate the First Amendment as Applied to Appellees.

Appellee political committees were formed for the primary purpose of helping to elect federal candidates. They aggregated millions of dollars through mass mailings that sought neither ideas nor words but only money for political advertising. They then used the money they raised to supplement the campaign of a Presidential candidate who had voluntarily declined private financial support, doing the same things official committees would have done if the candidate had not chosen public financing.

There is no absolute First Amendment right to engage in such activity. Appellees' suggestion[31] that *Buckley* stands for the proposition that all expenditure limits are unconstitutional is wrong.[32] For example, a publicly financed Presidential candidate does not have a right to make unlimited expenditures,[33] and labor unions and corporations do not have a right to make independent expenditures to support candidates.[34] Where, as here, a

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[31] AFC Br. 7, 26-32; AEP Br. 28, 30; FCM Br. 10-13.

[32] *See* CC Br. 18-19.

[33] *Republican National Committee v. FEC*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980).

[34] *Cf. First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978); *see Pipefitters Local 562 v. United States*, 407 U.S. 385 (1972); *United States v. Automobile Workers*, 352 U.S. 567 (1957); *United States v. C.I.O.*, 335 U.S. 106 (1948).

Appellees' heavy reliance on *Bellotti* is misplaced. Contrary to their implication, the case did not hold either that the source of speech is irrelevant to the First Amendment balancing test or that organizations have the same First Amendment rights as individuals. As Justice Powell's opinion made clear, the Court

limitation is designed to eliminate a serious public evil (other than any danger supposedly inherent in the content and impact upon the public of the ideas expressed), speech and associational rights must be balanced against the needs of the public, and a narrowly drawn statute will be sustained.[35]

Appellees' problem is that the only governmental interest they see is to prevent *"quid pro quos"* in the narrowest sense—mid-campaign exchanges of contributions for promises.[36] But Congress had a larger objective—to give the candidate the option of freeing himself from dependence on private fundraising[37]—and Congress plainly believed that Section 9012(f) is necessary to curb activities that would undermine the concept of public financing as a "substitute" for private financial support. *See Buckley*, 424 U.S. at 99.

Appellees' case ignores several political realities that Congress appreciated:

First, financial support for a candidate leads to beholdenness and the appearance thereof. Justin Dart, the chief sponsor of one of the largest industrial political action committees, put the point crisply when he said

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there had no "occasion to consider whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities." 435 U.S. at 777-78 n.13. *See also* CC Br. 18 n.28, 22.

[35] *See id.* 15-23.

[36] AFC Br. 36; *see also id.* at 8, 45; AEP Br. 33; FCM Br. 27.

[37] *See* CC Br. 25-26, 32-33. *Accord, e.g.*, 117 Cong. Rec. 41937-38 (Nov. 18, 1971) (Senator Mansfield) ("some form of public financing is the only way to put an end to the day of 'labor's' man or 'industry's' man; . . . under this amendment, he would be the people's man."); *id.* at 41780 (Nov. 17, 1971) (Senators Hart and Eagleton); *id.* at 41939 (Nov. 18, 1971) (Senator Pastore); *id.* at 41963 (Senator Long); *id.* at 42631 (Nov. 22, 1971) (Senator Spong); *id.* at 41767 (Nov. 17, 1971) (Senator Cannon).

that dialogue with politicians "is a fine thing, but with a little money, they hear you better." [38]

Second, in an election from which contributions are excluded, financial support in the form of expenditures leads to the same problem of beholdenness. As Douglas L. Bailey, one of AEP's media directors, said:

> "The people who wield the authority coming out of private fundraising are not the people who give the money so much as the people who raise the money. . . ." Deposition of Douglas L. Bailey at 28 in *Republican National Committee v. FEC*, *supra*.

A particularly unsubtle example may illustrate the point. NCPAC is an "independent" political committee that spent over $2 million in the 1980 Presidential campaign. In 1981, NCPAC's National Chairman wrote Congressman Neal:

> "If you will make a public statement in support of the President's tax cut package and state that you intend to vote for it, we will withdraw all [independent, hostile] radio and newspaper ads planned in your district. In addition, we will be glad to run radio and newspaper ads applauding you for your vote to lower taxes." 127 Cong. Rec. H4911 (daily ed. July 27, 1981).

Third, coordination with the candidate's campaign is not a prerequisite to beholdenness. The candidate will certainly know about a multimillion dollar "X for President" campaign conducted by his friends and would-be friends, and he may owe his election to it. The administration of a President who has benefited from efforts to raise and spend tens of millions of dollars for ads supporting his candidacy is not "free and independent" merely because he did not talk to any of the political

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[38] *The Wall Street Journal*, Aug. 15, 1978 at 1, col. 6. Evidence that campaign support buys influence is, of course, abundant. *See, e.g.*, D. Adamany, "Financing National Politics," in *The New Style in Election Campaigns* 395-97 (R. Agranoff, ed., 1976); D. Dunn, *Financing Presidential Campaigns* 19-21 (1972). *See also* note 37, *supra*.

committee organizers for a few months after he was nominated.

AFC admits as much, although it attempts to downplay the significance of this telling admission by using euphemisms:

> "no problem of corruption is created when a political committee (or any person) earns *some measure of loyalty* from a candidate because it effectively advocates the candidate's election." AFC Br. 44 (footnote omitted) (emphasis added).[39]

The "loyalty" AFC is talking about is an obligation of a successful candidate and his administration, owed not to an idea or to all the people but to a political committee and its organizers, as such, on account of the money they raised and spent "effectively advocating" his election. Experience has taught us just what such "loyalty" entails.

Appellees suggest that their expenditures may do more harm than good and, therefore, cannot create political debts.[40] At best, that factual assertion, made by the court below as well,[41] serves as a reminder that the court struck down Section 9012(f) without permitting appellants to offer proof that independent expenditures by political committees can be counted on (by both the candidate and the political committee) to help rather than hurt. Appellees' assertion also conflicts with their boasts

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[39] *See also* AEP Br. 33-34.

[40] AFC Br. 40 n.45; AEP Br. 31-32; FCM Br. 27. The principal factual basis advanced by AEP for such a finding is that independent committees do not have access to the opinion polls that the official campaign uses and that, even if they did, the independent committees would probably draw different conclusions about which campaign tactics would be most useful. AEP Br. 31-32. *But see* CC Br. 10 & n.18 (describing use of common pollsters, consultants and other common vendors by political committees and the official campaign).

[41] 512 F. Supp. at 495, C.C. App. 12a.

to their contributors about how essential the committees' activities were to their candidate's election.[42]

"Independent" political committees operating in a publicly financed Presidential general election can be far more effective than was apparent when the Court questioned the effectiveness of the kind of independent expenditures at issue in *Buckley*. *See* 424 U.S. at 47. Political committees, whose primary purpose is, by definition, to further the election of a candidate, do not need to be told by the official campaign that straightforward, massive media advertising will help. Nor do they need to be told how to do it (particularly where, as here, they hire the same consultants and media experts used by the official campaign).[43]

Fourth, what in 1980 may have been viewed only as the luxury of an extra few millions of advertising dollars will become the necessity of extra tens of millions if Section 9012(f) is struck down.[44] And the successful candidate will be, and will appear to be, beholden to those who organize and manage the political committees that raise those tens of millions to help him win.[45]

On the other side of the balance, Section 9012(f) does prevent the organizers and managers of political committees from earning "some measure of loyalty" by raising and spending other people's money. But their right to raise and spend other people's money is at best en-

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[42] *See, e.g.*, CC Br. 6-7.

[43] *See id.* 9-10 and n.19, 31-32.

[44] According to the Commission's records, PAC contributions to Congressional candidates have quadrupled from $12.5 million in 1974 to $55.3 million in 1980. *Compare* Common Cause Campaign Finance Monitoring Project, 1974 Congressional Finance: Vol. V, Interest Groups and Political Parties at xii (1976) *with* Federal Election Commission, FEC Issues Final Summary Data on PAC Giving (Press Release, August 4, 1981).

[45] *See* CC Br. 26-34.

titled to less protection than their personal speech,[46] which Section 9012(f) does not curtail at all. The Nation's interest in giving the presidential candidate the option to remain "a free and independent man" plainly outweighs any burden on their activities.

Hence appellees, like the court below, place primary stress on the argument that Section 9012(f) prevents their *contributors* from engaging in a significant political speech.[47] But appellees did not seek words or ideas from their contributors, only money. This Court held in *Buckley* and reaffirmed in *California Medical Association v. FEC*, 101 S.Ct. 2712 (1981), that limiting the opportunity to give money to a campaign organization "does not in any way infringe the contributor's freedom to discuss candidates and issues." *Buckley*, 424 U.S. at 21. Contributions of money to political committees show at best only "undifferentiated, symbolic" support for the candidate. *Id.* They involve only "marginal" First Amendment interests. *Id.* at 20. *California Medical Association* reaffirmed that

> "[T]he 'speech by proxy' that [a contributor] seeks to achieve through its contributions to [a political committee] is not the sort of political advocacy that this Court in *Buckley* found entitled to full First

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[46] In upholding broad restrictions on the partisan political activities of five million federal employees, this Court specifically approved prohibitions against soliciting money for partisan purposes and against managing campaign organizations. *See Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 578 n.21 (1973). At the same time, the Court declined to decide what it regarded as the more serious constitutional question of whether prohibitions on partisan endorsements by individuals through the media would violate the First Amendment. *Id.* at 580-81. *Buckley* reaffirmed the importance of the line drawn in *Letter Carriers*. 424 U.S. at 48 n.54.

[47] AFC Br. 31-32; AEP Br. 27-28; FCM Br. 23. *See* 512 F. Supp. at 496-97, C.C. App. 15a-17a.

> Amendment protection . . . . Of course, [a contributor] would probably not contribute to [the committee] unless it agreed with the views espoused by [the committee], but this *sympathy of interests alone does not convert* [*the committee's*] *speech into that of* [*its contributors*]." 101 S. Ct. at 2721-22 (emphasis added).[48]

Nor is appellees' First Amendment argument enhanced by describing the same restriction as a burden on the associational freedom of those who would contribute to an unauthorized political committee. The only associational freedom Section 9012(f) limits is one that involves little associating and much donating. That restriction is of the kind *Buckley* sustained, 424 U.S. at 24-29, and it is justified for the same reasons as the restraint on the ability of the managers of the political committee to raise and spend aggregated funds on behalf of a publicly financed candidate.

The suggestion that for a nonwealthy individual a contribution to an unauthorized political cammittee is "the only remaining legal avenue for effective political participation in presidential elections"[49] is way off the mark. There remain many expressive and supportive activities other than giving dollars to appellees.[50]

B. Section 9012(f) Is Not Vague, Overbroad, or Underinclusive.

Appellees, invoking hypothetical applications of Section 9012(f) to activities that do not resemble anything before the Court, ask the Court to find Section 9012(f)

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[48] Like CALPAC, the political committee in *California Medical Association*, appellees are "multicandidate political committees" that make contributions to candidates as well as expenditures. See the data the Commission lodged with the Court.

[49] AEP Br. 35.

[50] *See* CC Br. 38-41.

unconstitutional because of alleged vagueness, overbreadth, or underinclusiveness, even if it clearly and properly applies to them. A proper, historically sound definition of the term "political committee" puts to rest all of appellees' conjectures.

1. *Section 9012(f) Is Not Vague or Overbroad.*

Appellees argue that Section 9012(f) chills or restricts expression of personal views, discussion of political issues, and even scholarly research. Those arguments evaporate when "political committee" is given its "commonly accepted sense," *United States v. Harriss*, 347 U.S. 612, 620 (1954). A political committee is an organization that raises money from outsiders and spends it primarily to promote the election of political candidates.[51] That meaning is reflected in decisions of this Court and it is quite evidently what Congress had in mind when considering the Fund Act and prior legislation.

The Court has already drawn a clear line between a "political committee" and an issue-oriented organization. *Buckley* construed the term "political committee" to encompass only "organizations . . . the major purpose of which is the nomination or election of a can-

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[51] Section 9012(f) need not be construed to encompass only expenditures that in express terms advocate election or defeat of a clearly identified candidate. *See* AFC Br. 41-42. When "political committee" is construed as suggested, Section 9012(f) does not reach issue-oriented groups but only those organizations whose activities are "by definition, campaign related." *Buckley*, 424 U.S. at 79. There is thus no need to examine the products of their expenditures to determine whether they use words of express advocacy in order to ensure that the purposes of the statute are served. This conclusion parallels the differing approaches that *Buckley* followed in construing the scope of the FECA disclosure provisions for "political committees" on the one hand and for individuals and groups that were not "political committees" on the other." *See id.*; *compare id.* at 79-81.

didate . . . ." 424 U.S. at 79.[52] The Court has also recognized the line between a "political committee," which raises money from outsiders, and a group of individuals who pool their money and control its disbursement so as to express views that the individuals hold in common. *California Medical Association* expressly noted that contributions to political committees differ from "expenditures made jointly by groups of individuals in order to express common political views." 101 S. Ct. at 2722 n.17.[53]

Congress has long used the term "political committee" as a means of drawing "distinctions between political campaigning and other activities."[54] Indeed, the legisla-

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[52] *See* CC Br. at 41 n.68. For all of their misplaced emphasis on the supposed breadth and vagueness of Section 9012(f), none of the appellees' briefs discussed the definition of "political committee" in *Buckley* or our suggestion that it should control the meaning of Section 9012(f).

Since 1976, lower federal courts have relied on the *Buckley* construction of "political committee" as establishing limits on the Commission's regulatory authority. *FEC v. Machinists Non-Partisan Political League*, No. 80-1136 (D.C. Cir. May 19, 1981), Slip. op. at 23-25; *FEC v. Florida For Kennedy Committee*, 492 F. Supp. 587 (S.D. Fla. 1980).

[53] The distinction between expenditures by "political organizations" and expenditures by individuals (acting singly or jointly) or other organizations has to be made for purposes independent of Section 9012(f). Under Section 527 of the Internal Revenue Code, "political organizations" receive favorable tax treatment. They are defined by a primary purpose test essentially identical to the one we have urged for political committees under Section 9012(f). *See* I.R.C. §§ 527(e)(1), (2) (1976).

[54] Discussing the use of the term "political committees" in the Federal Corrupt Practices Act, the House Special Committee to Investigate Campaign Expenditures noted in 1945:

> "In thus defining the categories of organizations and individuals required to report, and the kinds of receipts and expenditures to be reported, the Congress naturally used lan-

tive history of the Fund Act confirms that Congress sought to draw that line when it rejected Senator Taft's proposal to include all groups of whatever kind within Section 9012(f). In the colloquy quoted at pages 9-11 *supra*, it is apparent that both Senator Taft and Senator Pastore thought the term "political committee" meant a specific and traditional kind of organization and that there were corporations, labor organizations, associations, and other committees and groups that would not be covered by the term "political committee." The entire debate between Senator Taft and Senator Pastore was about whether the section should be amended to reach other organizations, like "a committee of faculty members say at Columbia University," which both Senators agreed were not political committees. Thus Senator Pastore assured Senator Magnuson that a group of people who "hire[d] a hall for a mass meeting" or who "spread out on election day to go to the polls to support Mr. A" would not be covered.[55] Conversely, every Senator in the 1971 debate would have recognized appellees as "political committees."

Because the "commonly accepted sense" of the term "political committee" eliminates any problem of vagueness and makes the statute constitutionally definite, "this Court is under a duty to give the statute that construc-

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guage designed to exclude organizations and activities of a social, charitable, religious, patriotic, civic, or educational—as distinguished from a political—character." H.R. Rep. No. 78-2093, 78th Cong., 2d Sess. 7 (1945).

[55] 117 Cong. Rec. 42626 (Nov. 22, 1971) (Senators Magnuson and Pastore). Senator Pastore added "So long as the candidate knows nothing about it and there is no subterfuge about it, the people are entitled to act as they will." *Id.*

tion." *United States v. Harriss*, 347 at U.S. 618.[56] As the Court held in sustaining the Federal Regulation of Lobbying Act against First Amendment attack, "if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise." *Id.* at 618.[57]

When the term "political committee" is given its "commonly accepted sense," Section 9012(f) is not overbroad. It applies only to the kind of campaign activities Congress could constitutionally restrict. But "even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the "remainder of the statute . . . covers a whole range of easily identifiable and constitutionally

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[56] Rejection of appellees' vagueness challenge is especially warranted in light of the Commission's power to render advisory opinions. Under amendments enacted to cure the deficiencies noted in *Buckley*, 424 U.S. at 40 n.47, any person, entity or group may promptly obtain an advisory opinion. 2 U.S.C.A. § 437f(a)(1) (1981). The Commission's opinion that a particular activity is not prohibited insulates persons who rely on the opinion from liability. *Id.* § 437f(c). "When a means like this one is available to reduce uncertainty or narrow the statute's reach and that means can be pursued at little risk to the rights asserted, the chill induced by facial vagueness or overbreadth is *pro tanto* reduced." *Martin Tractor Co. v. FEC*, 627 F.2d 375, 386 (D.C. Cir.), *cert. denied*, 449 U.S. 954 (1980). *Accord, id.* at 388, 389-90; *Civil Service Commission v. Letter Carriers*, 413 U.S. at 580; *Broadrick v. Oklahoma*, 413 U.S. 601, 608 n.7 (1973).

[57] As this Court has recognized, "It will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be a nice question.'" *Grayned v. City of Rockford*, 408 U.S. 104, 110 n.15 (1972), *quoting American Communications Ass'n v. Douds*, 339 U.S. 382, 412 (1950).

proscribable. . . conduct . . . .'" *Parker v. Levy*, 417 U.S. 733, 760 (1974), *quoting Civil Service Commission v. Letter Carriers*, 413 U.S. at 580-81.[58]

2. *Section 9012(f) Is Not Underinclusive.*

Some of the appellees argue that Section 9012(f) is impermissibly underinclusive because of the exemptions in subparagraph (2).[59] But Congress has perceived since 1910 that "political committees" pose special problems for the integrity of the electoral process.[60] No comparable history suggests that broadcasters, periodicals, and organizations exempted from taxation under I.R.C. § 501(a) pose dangers comparable to those Congress saw in political committees.

Absent some facts, which appellees do not offer, there is no reason to think that these entities make expenditures of "the same innate character" or "pose[] the same danger" [61] as political committees. Nor is there anything

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[58] *California Medical Association, supra*, confirms this rule in a context similar to the present one. There, amicus ACLU argued that the provision at issue "would violate the First Amendment if construed to limit the amount individuals could jointly expend to express their political views." 101 S. Ct. at 2722 n.17. Finding that the statute regulated a distinct set of transactions involving multicandidate political committees, the Court concluded that it "need not consider this hypothetical application of the Act." *Id.*

[59] FCM Br. 31-32; AEP Br. 34-38. It seems clear that Congress added these exemptions out of an abundance of caution. There is no reason to think that the organizations exempted by Section 9012(f)(2) would be considered "political committees" in any but the most unusual circumstances.

[60] Act of June 25, 1910, ch. 392, Pub. L. No. 274, 36 Stat. 822 (1910). President Roosevelt had called for legislation requiring disclosure of expenditures by political committees in 1904 and 1905. *See* 40 Cong. Rec. 96 (Dec. 5, 1905). *See also* Federal Corrupt Practices Act of 1925, ch. 368, Title III, 43 Stat. 1053, 1070 (1925).

[61] FCM Br. 31.

"bizarre" [62] about a conclusion that special threats are posed by organizations whose principal purpose is to advance a candidate's ends, and which concentrate aggregations of money from outsiders in the hands of a few managers who maintain control over them.

Appellees are also wrong in suggesting that Section 9012(f) impermissibly favors the wealthy individual.[63] Section 9012(f) is neutral on its face. *See Ross v. Moffitt*, 417 U.S. 600 (1974); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Because of the vast amount of money that political committees such as appellees can amass and control to benefit a candidate, they generally pose a much greater threat to the independence and integrity of publicly funded candidates than do individuals.[64] On the other hand, political committees do not further the interests of personal expression the First Amendment protects most strongly. Section 9012(f) is not unconstitutional because Congress did not legislate against every conceivable instance of the undue influence of wealth. The "statute is not invalid under the Constitution because it might have gone farther than it did." *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966).

III. COMMON CAUSE'S APPEAL ON THE SUBSTANTIVE ISSUES IS PROPERLY BEFORE THIS COURT.

The Commission's contention that the Court has no jurisdiction over the substantive issues in *Common Cause v. Schmitt* [65] is plainly meritless.

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[62] AEP Br. 35.

[63] *See* AFC Br. 35; *cf.* FCM Br. 20.

[64] *See* CC Br. 36-37. Appellees have not disputed this fact.

[65] FEC Br. as Intervenor-Appellee 8-11.

First, under the unusual circumstances of these cases the Court may, and should, decide both cases on the merits without deciding whether Common Cause's action was properly before the district court. Count I of the Common Cause complaint raises the same substantive statutory and constitutional issues as the Commission's complaint.[66] The same issues are raised by the two appeals and must be decided on the Commission appeal regardless of the action taken in the Common Cause case. *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10, 16 (1963), holds squarely that under these circumstances the Court may decide both cases on the merits without regard to the jurisdictional question presented in one.[67]

The *McCulloch* rule should be followed here. The Commission appears to agree.[68] If this Court reverses the judgments below in accordance with our submission, any continuing controversy over Common Cause's right to bring the action may be decided on remand.

Second, Count I of Common Cause's action and this appeal are authorized by the express words of 26 U.S.C. § 9011(b) (1976). This specific grant of private rights of action renders utterly irrelevant the Commission's reliance on *Cort v. Ash*, 422 U.S. 66 (1975), and similar cases discussing when a private right of action may be implied.[69] We addressed the other arguments now be-

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[66] *See* 512 F. Supp. at 501, C.C. App. 25a.

[67] We think that the district court used the word "moot" to describe the *McCulloch* situation; it was saying that the issues raised by Count I of the Common Cause complaint were "moot" in the sense that they need not be separately decided rather than in the sense that a "case or controversy" had ceased to exist. A case does not become "moot" in the latter sense merely because the issue is governed by a previous decision of the same court.

[68] FEC Br. as Intervenor-Appellee 6.

[69] *See id.* 12-16.

latedly made by the Commission in our Opposition to Motions to Dismiss or Affirm filed prior to the noting of probable jurisdiction. To the extent necessary, we rely upon that discussion here.

CONCLUSION

For the reasons stated above and in our opening brief, the Court should reverse the judgment of the district court. If, however, the Court should find that the record is insufficient to support reversal of the judgment, it should vacate the decision below and remand the case for factual development.

Respectfully submitted,

LOUIS R. COHEN
Counsel of Record
ROGER M. WITTEN
BRUCE E. COOLIDGE
CLIFFORD B. HENDLER
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Attorneys for Appellants Common Cause, David Cohen and Winifred Long

Of Counsel:
ARCHIBALD COX
KENNETH J. GUIDO, JR.
ELLEN G. BLOCK
DONALD J. SIMON
COMMON CAUSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1200

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IN THE

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Appellants,

v.

HARRISON SCHMITT, *et al.*,
Appellees.

FEDERAL ELECTION COMMISSION,
Appellant,

v.

AMERICANS FOR CHANGE, *et al.*,
Appellees.

On Appeals from the United States District Court for the District of Columbia

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

PHILIP A. LACOVARA
GERALD GOLDMAN
RONALD A. STERN*

HUGHES HUBBARD & REED
1660 L Street, N.W.
Washington, D.C. 20036
(202) 862-7400

Attorneys for Amicus Curiae American Civil Liberties Union

Of Counsel:

CHARLES S. SIMS
ARTHUR EISENBERG
ARTHUR B. SPITZER

AMERICAN CIVIL LIBERTIES UNION
132 West 43rd Street
New York, New York 10036
(212) 944-9800

*Counsel of Record

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

The American Civil Liberties Union submits this brief as *amicus curiae* in support of the judgment of the United States District Court for the District of Columbia declaring that 26 U.S.C. § 9012(f) is an unconstitutional abridgment of the freedoms of speech and association safeguarded by the First Amendment.

INTEREST OF *AMICUS CURIAE* [1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit organization with more than 200,000 members. For more than sixty years, the ACLU has been dedicated

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[1] Letters from attorneys for each of the parties consenting to the filing of this *amicus* brief have been submitted to the Clerk of the Court.

to upholding and protecting the First Amendment rights of all persons, irrespective of their partisan political interests or affiliations.

In defense of the fundamental First Amendment right of individuals and associations to engage in political expression, the ACLU has long been an active participant in litigation involving the constitutionality and interpretation of the federal election laws. The ACLU participated in two of the early cases involving the Federal Election Campaign Act of 1971—*United States v. National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972), and *ACLU v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973)(three-judge court), *vacated as moot sub nom. Staats v. ACLU*, 422 U.S. 1030 (1975).

The New York Civil Liberties Union, an affiliate of the ACLU, was one of the plaintiffs in *Buckley v. Valeo*, 424 U.S. 1 (1976), the landmark challenge to the constitutionality of the 1974 amendments to the Federal Election Campaign Act and the Presidential Election Campaign Fund Act. Recently, the ACLU served as counsel for two of the defendants in *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980)(*en banc*), involving reporting and disclosure requirements of the Federal Election Campaign Act, and participated as *amicus curiae* in *California Medical Association v. Federal Election Commission*, No. 79-1952 (U.S. June 26, 1981), involving limitations on contributions to political committees adopted by Congress subsequent to this Court's decision in *Buckley v. Valeo*.

The American Civil Liberties Union Fund of the National Capital Area, the Washington area litigation branch of the ACLU, participated as *amicus curiae* in the district court in these consolidated cases on the issue of the constitutionality of the $1,000 limitation on independent expenditures imposed by 26 U.S.C. § 9012(f)—the principal question presented by these consolidated appeals.[2]

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[2] *Amicus* takes no position on and does not address the question presented in the brief of intervenor-appellee Federal Election Commission in No. 80-847 regarding the propriety of Common Cause's appeal or its attempt to bring suit under 26 U.S.C. § 9011(b).

SUMMARY OF ARGUMENT

The statutory provision at issue in these appeals, 26 U.S.C. § 9012(f), makes it a crime for any group to spend more than $1,000 on independent advocacy of presidential candidates who have chosen to accept federal financing for their campaigns. This provision has the practical effect of barring any effective independent group political expression in support of major party candidates for our nation's highest office. Like the $1,000 limitation on independent political expenditures ruled unconstitutional by this Court in *Buckley v. Valeo, supra,* section 9012(f) directly and drastically restricts the exercise of fundamental First Amendment freedoms of political speech and association.

Section 9012(f)'s abridgment of these basic freedoms cannot survive the "exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley v. Valeo, supra,* 424 U.S. at 44-45. Each of the governmental interests asserted by appellants in an effort to sustain section 9012(f)'s expenditure limitation—preservation of the integrity of public financing provisions of the Presidential Election Campaign Fund Act and elimination of corruption and the appearance of corruption in presidential campaigns—has been considered and rejected as inadequate to justify direct limits on political expression. *See Buckley v. Valeo, supra,* 424 U.S. at 39-59; *Republican National Committee v. Federal Election Commission,* 487 F. Supp. 280, 285-286 (S.D.N.Y.) (three-judge court), *aff'd mem.,* 445 U.S. 955 (1980).

The limiting construction of section 9012(f) proffered by appellants is wholly insufficient to save the statute from invalidation. The construction advanced by appellants, which would exempt an ill-defined class of small, informal groups from section 9012(f)'s draconian expenditure ceiling, involves a wholesale rewriting of the provision that conflicts with the language employed by Congress and the authoritative administrative interpretation of the section by appellant Federal Election Commission. Appellants' ill-conceived salvage effort simply adds to section 9012(f)'s constitutional infirmities by

engrafting a hopefully vague standard to its criminal prohibition without alleviating section 9012(f)'s intolerable restriction of core First Amendment freedoms of speech and association.

ARGUMENT

I. SECTION 9012(f) IMPERMISSIBLY BURDENS FUNDAMENTAL FIRST AMENDMENT FREEDOMS.

Section 9012(f) makes it a crime for any nonauthorized political committee to expend more than $1,000 to further the election of a presidential candidate who has chosen to receive federal funding for his own campaign.[3] Section 9012(f)(3) threatens the individuals who are involved in this offense with imprisonment for up to a year, plus a stiff fine. This stringent prohibition on political expression applies to any "nonauthorized" political committee—a concept that sweeps in any group of persons that wants to influence the electorate, but has not been authorized in writing by the candidate to incur expenses to further his election. *See* 26 U.S.C. §§ 9002(1),(9); 11 C.F.R. §§ 100.5, 9002.9 (1981).[4]

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[3] Section 9012(f)(1) states in pertinent part:

> "[I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000."

[4] Section 9002(9) defines "political committee" to mean:

> "*any* committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office." (Emphasis added).

Regulations adopted by appellant Federal Election Commission define "political committee" for purposes of section 9012(f) as "*any* committee, club, association, or *other group of persons* which receives contributions aggregating in excess of $1,000 or which makes expenditures in excess of $1,000 during a calendar year." 11 C.F.R. § 100.5 (1981)(emphasis added), incorporated in 11 C.F.R. § 9002.9 (1981). The scope of the term "political committee" is discussed at greater length in part II.A of this brief.

Section 9002(1) defines "authorized committee" to mean:

> "with respect to the candidates of a political party for President and Vice President of the United States, any political committee which is authorized in writing by such candidates to incur expenses to further the election of such candidates . . . ."

As with the limitations on independent expenditures struck down in *Buckley*, section 9012(f) directly and severely restricts the exercise of fundamental freedoms of speech and association—freedoms that have their "'fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley v. Valeo, supra,* 424 U.S. at 15, *quoting Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971). Since the drastic curtailment of basic First Amendment freedoms produced by section 9012(f) does not serve any compelling governmental interest, section 9012(f) is unconstitutional on its face.

A. Section 9012(f) Severely Restricts Freedom Of Speech And Association In Presidential Campaigns.

In *Buckley v. Valeo, supra,* this Court examined a wide array of contribution and expenditure limitations enacted by Congress as part of the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263. The Court concluded that, although the "contribution and expenditure limitations both implicate fundamental First Amendment interests," the "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions." 424 U.S. at 23. The Court's lengthy analysis of expenditure limitations similar to the one at issue here, particularly the $1,000 limit on independent expenditures, is controlling in this case.

This Court emphasized in *Buckley* that the various expenditure limitations contained in the Federal Election Campaign Act ("Campaign Act") posed "substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Id.* at 19. The practical link between political expenditures and political advocacy in modern American society could not be stronger. As the Court recognized, "virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Id.* at 19. Thus, a "restriction on the amount of money a person or group can spend on political communication during a campaign *necessarily* reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* (emphasis added).

Applying constitutional principles to these realities of political life, the Court forcefully concluded:

> "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people—*individually as citizens and candidates and collectively as associations and political committees*—who must retain control over the quantity and range of debate on public issues in a political campaign." *Id.* at 57 (emphasis added).

The most debilitating of the expenditure limitations addressed by the Court in *Buckley* was the $1,000 ceiling then imposed by 18 U.S.C. § 608(e)(1) on independent expenditures in support of any candidate for federal office. This limit on independent expenditures severely restricted political expression by excluding "all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication." 424 U.S. at 19-20. By stifling political expression by groups, section 608(e)(1) also had a devastating effect on the fundamental right of association. The $1,000 limit on independent expenditures threatened to end any meaningful exercise of associational freedoms in federal election campaigns by precluding "associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association." *Id.* at 22. Accordingly, the Court declared section 608(e)(1) unconstitutional. *Id.* at 51.

The statutory provision at issue in this case, 26 U.S.C. §9012(f), imposes restrictions on First Amendment freedoms of speech and association that are virtually identical to those that prompted this Court to invalidate section 608(e)(1). Section 9012(f), a part of the Presidential Election Campaign Fund Act (the "Fund Act"), prohibits any non-authorized

political committee—defined broadly by Congress and the Federal Election Commission to encompass any committee, association, organization, or other group of persons—from making independent expenditures in excess of $1,000 to further the election of a presidential candidate who has chosen to receive federal funding for his own campaign.[5]

It would be hard to imagine a tighter noose on the neck of vital constitutional guarantees than the constraint on independent expenditures imposed by section 9012(f). Even in January 1976, when this Court decided *Buckley*, its $1,000 expenditure ceiling would have precluded political committees from taking out a single quarter-page advertisement in virtually any metropolitan newspaper in the country. *See Buckley v. Valeo, supra,* 424 U.S. at 40.[6] As a practical matter, section

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[5] Section 9012(f) applies only to independent expenditures by groups. It does not reach expenditures made at the direction of or in coordination with the candidate or the candidate's official campaign. Such coordinated expenditures are treated as contributions and, as such, are prohibited absolutely by other provisions of the Fund Act in the case of presidential candidates who have chosen to accept federal funding. 26 U.S.C. §§ 9003(b)(2), 9012(b); 11 C.F.R. § 9002.13 (1981); *see Buckley v. Valeo, supra,* 424 U.S. at 46-47 n.53.

Common Cause, although acknowledging that this appeal only addresses the right of appellees to make independent expenditures (Common Cause Br. at 10 n.19), persists in suggesting through repeated references in its brief to "independent"committees (Common Cause Br. at 21, 27, 28, 29, 30, 31, 32) that appellees do not in fact operate independently of the candidates they support. This factual issue, on which *amicus* takes no position, has no relevance to these appeals which concern the constitutionality of section 9012(f)'s ceiling on independent expenditures.

[6] The Fund Act includes provisions that automatically increase the amount of federal financing provided to eligible presidential candidates to adjust for increases in the consumer price index. 26 U.S.C. §§ 9004, 9008; *see* 2 U.S.C. § 441a(c). Section 9012(f)'s $1,000 ceiling, however, does not increase with inflation. This $1,000 limit already has been more than cut in half by inflation since it was enacted by Congress in 1971. *See Economic Report of the President,* Table B-52 (1981). Today, the $1,000 ceiling imposed by section 9012(f) limits political committees to *less than half* the amount required to purchase a single *one-eighth page* advertisement in the *Washington Post.* In the years ahead, the corrosive impact of inflation will shrink still further the amount of group political expression permitted by section 9012(f).

9012(f) is equivalent to a total ban on any independent group electioneering in support of presidential candidates who accept public funding.

While section 9012(f) does not restrict independent expenditures by individuals, this limitation does little to mitigate the provision's drastic curtailment of political expression and association. As this Court emphasized in *Buckley*, the "electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." 424 U.S. at 19. Only a tiny fraction of Americans can afford, as individuals, to utilize the expensive means of communication that are essential to effective political advocacy. The great majority of citizens can participate effectively in our nation's political dialogue only by banding together to pool their resources in order to communicate through political associations. As the three-judge district court emphasized in this case, "[i]f section 9012(f) were not struck down, individuals of modest means would have no right to join with others to state their views to the public with some force." Common Cause J.S. App. at 22a.[7]

Appellants turn the First Amendment on end when they highlight the growth in group political expression fostered by political committees as a reason for sustaining section 9012(f). Although appellants rail against the emergence of vocal, active political groups, this is a constitutionally protected phenomenon. These groups are simply an increasingly important component of the wide-open debate and the free marketplace of ideas that the First Amendment was intended to nurture.

The figures cited by appellants actually serve to document the drastic curtailment of the quantity and diversity of political

[7] Citations in the form "Common Cause J.S. App.," "Common Cause J.S.," and "FEC J.S." refer, respectively, to the appendices to the jurisdictional statement filed by appellant Common Cause, the jurisdictional statement filed by Common Cause, and the jurisdictional statement filed by appellant Federal Election Commission. Citations to "Common Cause Br." and "FEC Br." refer, respectively, to the brief filed by Common Cause and the brief filed by the Federal Election Commission.

expression that would result if section 9012(f) were upheld.[8] It is precisely this adverse impact of expenditure limitations that this Court in *Buckley* found wholly incompatible with the First Amendment. As the Court emphasized, " 'there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates . . . .' " 424 U.S. at 14, *quoting Mills v. Alabama,* 384 U.S. 214, 218 (1966). As a result, like other "legislative restrictions on the advocacy of the election or defeat of political candidates," section 9012(f) is "wholly at odds with the guarantees of the First Amendment"—guarantees that reflect "our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' " *Buckley v. Valeo, supra,* 424 U.S. at 14, 50, *quoting New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964).

Appellants distort this Court's decision in *Buckley* and ignore the teachings of other First Amendment decisions in arguing that the effect of section 9012(f) upon speech and associational rights "is, for all substantial purposes, the same as that of the contribution ceilings in *Buckley*" and that the section therefore implicates "only 'marginal' First Amendment interests." Common Cause Br. at 19, 38, *quoting Buckley v. Valeo, supra,* 424 U.S. at 20; *see* FEC Br. at 49-50. The contribution limitations addressed in *Buckley* did not place a ceiling on the amount of money that any individual, candidate, or group could devote to independent advocacy of the election or defeat of candidates. 424 U.S. at 29. Nor did they threaten political expression by preventing "candidates and political committees from amassing the resources necessary for effective advocacy."

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[8] According to appellant Common Cause, "only four individuals made independent expenditures in excess of $5,000 to advocate the election or defeat of Mr. Carter or Mr. Reagan, and the total sums spent by all individuals were smaller by far than the sums spent by appellees." Common Cause Br. at 37 n.61. While the amount of individual expenditures might well increase if independent group expenditures were outlawed, the figures cited by Common Cause underscore the enormous threat that section 9012(f) poses to vigorous debate regarding candidates for our nation's highest office.

(footnote continues)

Id. at 21. By contrast, section 9012(f) precludes any meaningful group expenditures for political expression in support of a presidential candidate who has agreed to receive public funding. It is thus a direct and draconian restraint on the freedom of individual citizens to associate to pursue effective political advocacy and the right of organizations that have legally raised substantial funds to expend those sums in the exercise of their freedom of speech.[9]

Appellants' argument must also be rejected because it rests on an unduly constricted view of the First Amendment guarantee of freedom of speech. Appellants contend that section 9012(f) does not abridge that basic freedom because expenditures by committees for political expression cannot be equated with personal speech by individual contributors. This Court, however, has firmly repudiated the premise underlying appellants' argument—that only the speech of individuals is accorded First Amendment protection.[10] As the Court emphasized in *First National Bank of Boston v. Bellotti,* 435 U.S. 765,

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Section 9012(f) not only would dramatically suppress the quantity of political speech available to the electorate, but would drastically limit the sources of information and opinion about candidates to the few entities exempted from section 9012(f)—the institutional press, established political parties, wealthy individuals, and the candidates themselves. *Compare Buckley v. Valeo, supra,* 424 U.S. at 39-40 (discussing the impact of section 608(e)(1)).

[9] This Court recently reaffirmed the important distinction between the impact of limitations on the amounts that individuals and groups may contribute to others and the effect of ceilings on direct political expenditures "made *independently* by a candidate, individual or group." *California Medical Association v. Federal Election Commission,* No. 79-1952, slip op. at 12 (U.S. June 26, 1981) (plurality opinion) (emphasis in original).

Section 9012(f) places no limit on the amount that individuals or groups may contribute to committees, but rather restricts the amount that any group may expend for independent advocacy in support of the presidential candidate of its choice. Section 9012(f), therefore, is a classic expenditure limitation that stifles "the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection." *Id.* at 13.

[10] Common Cause attempts to wring support for its "personal speech" theory of the First Amendment from a footnote in *Buckley. See* Common Cause Br. at 20-21 n.31, discussing 424 U.S. at 19 n.18. That footnote, in

(footnote continues)

777 (1978), the "inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, *association,* union, or individual." (Emphasis added). The political expression stifled by section 9012(f), to paraphrase *Bellotti,* " is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a [political committee] rather than an individual." *Id.; accord, Consolidated Edison Co. v. Public Service Commission,* 447 U.S. 530, 533 (1980).

B. Section 9012(f) Serves No Compelling Governmental Interest.

Appellants cannot save section 9012(f) merely by insisting that it represents a "reasonable" abridgment of fundamental First Amendment freedoms of speech and association. *See Buckley v. Valeo, supra,* 424 U.S. at 50. Rather, the constitutionality of section 9012(f), like that of the independent expenditure limitation in section 608(e)(1), "turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley v. Valeo, supra,* 424 U.S. at 44-45.

This is a test that section 9012(f) cannot possibly survive. Each of the governmental interests advanced by appellants has

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(footnote continued)

which the Court analogized the freedom permitted political expression under the Campaign Act's expenditure limitations to being "free" to drive as far and as often as one desires on a single tank of gasoline, was designed to illustrate the drastic impact of quantity restrictions on freedom of speech. The analogy had nothing whatever to do with whether the source of the expenditures was an individual or a group. A comparable analogy illustrating the impact of section 9012(f)'s expenditure limitation on the freedom of citizens to engage in effective political expression is to the "freedom" to travel by air or sea as far and as often as one desires so long as one pilots his own airplane or captains his own yacht. To continue with this analogy, section 9012(f)'s limitation on group expenditures is comparable to a ban on the ability of ordinary citizens to pool their limited resources in order to charter a bus or an airplane to enable them to exercise effectively their freedom to travel.

been considered and rejected in *Buckley* and subsequent cases as inadequate to sustain limitations on independent expenditures in political campaigns. *See Buckley v. Valeo, supra,* 424 U.S. at 39-59; *Republican National Committee v. Federal Election Commission, supra.* Indeed, as demonstrated below, the arguments advanced by appellants in support of the constitutionality of section 9012(f) are substantially weaker than those rejected as insufficient by this Court in *Buckley.*

1. Preservations of the Integrity of the Fund Act

Appellants contend that section 9012(f) serves a compelling public interest because it is part of the Fund Act's system of public financing of presidential election campaigns which this Court has upheld as consistent with the First Amendment. FEC Br. at 5-6, 33-36; Common Cause Br. at 11, 15. In fact, this Court's decision upholding other public financing provisions in *Buckley* lends no support to the expenditure ceiling imposed by section 9012(f). Moreover, contrary to the assertions of the Federal Election Commission, section 9012(f) is not necessary "to protect the goals of public financing." FEC Br. at 6.

a. Decisions sustaining public financing

In *Buckley,* this Court addressed a variety of challenges to the use of federal funds to finance presidential election campaigns. At issue was the legality of the expenditure of public dollars to facilitate political expression by candidates and the criteria established for determining a candidate's eligibility for public financing. The case did not sustain any limitation of independent political expression by supporters of candidates opting for federal financing. In upholding the basic public financing provisions, the Court stressed that those provisions represented "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." 424 U.S. at 92-93. Section 9012(f)—which restrains rather than enlarges public discussion—cannot be sustained simply because it was enacted along with the basic public financing provisions upheld in *Buckley.*

The Federal Election Commission strains to find support for section 9012(f) by claiming that "all challenged expenditure limitations in the context of publicly financed campaigns were upheld" in *Buckley*. FEC Br. at 34. This attempt to draw support from *Buckley* is both misleading and misplaced. The only expenditure limitation connected with public financing that was addressed in *Buckley* was the limitation on campaign spending by presidential candidates who apply for public funding. 26 U.S.C. § 9003(b). Both *Buckley* and the subsequent decision in *Republican National Committee* make clear that this ceiling on the candidate's own spending survives First Amendment scrutiny only because the candidate *voluntarily* chooses to accept the public funding alternative triggering the limitation on his own activities. *Buckley v. Valeo, supra,* 424 U.S. at 57 n.65; *Republican National Committee v. Federal Election Commission, supra,* 487 F. Supp. at 285.

As the *Republican National Committee* case demonstrates, no choice made by the candidate to accept federal funds may constitutionally diminish the rights of his supporters to make independent political expenditures—expenditures that section 9012(f) would make criminal. The court emphasized that regardless of how the candidate exercises his own freedom of choice, the candidate's supporters are left " 'free to engage in independent political expression,' " including "uncoordinated expenditures . . . *without limit.*" 487 F. Supp. at 286, *quoting Buckley v. Valeo, supra,* 424 U.S. at 28 (emphasis added). In short, *Republican National Committee*—a decision only recently and unanimously affirmed by this Court—concluded that the First Amendment precludes any limitations on independent expenditures by supporters of presidential candidates that have opted for public funding. 487 F. Supp. at 286. Thus, far from supporting section 9012(f), the key decisions upholding the Fund Act's public financing scheme demonstrate that section 9012(f)'s $1,000 ceiling on independent expenditures is unconstitutional.

b. The purposes of public financing

Section 9012(f) cannot be upheld as necessary to fulfillment of the goals of public financing. The Fund Act's public financing provisions are intended to accomplish two objectives:

> "[1] to give candidates the opportunity to lessen the 'great drain on [their] time and energies' required by fund-raising 'at the expense of providing competitive debate of the issues for the electorate' and [2] to 'eliminate reliance on large private contributions' and on the implicit obligations to private contributors that may arise from such reliance . . ." *Republican National Committee v. Federal Election Commission, supra,* 487 F. Supp. at 284, *quoting* S. Rep. No. 689, 93d Cong., 2d Sess. 5-6 (1974).

Neither objective can sustain section 9012(f).

Section 9012(f) is entirely unnecessary to accomplish the purpose of relieving candidates of the rigors and diversions of fund-raising. The public financing provision achieved this objective, at least for the presidential candidates of the two major parties, by providing each of them with almost $30 million for the 1980 campaign. The grant of these funds alone made it unnecessary—and, indeed, unlawful—for the candidates to attempt to raise additional contributions to support their campaigns. Both the Fund Act and the Campaign Act limit the candidate's campaign expenditures to the amount he receives through public financing. *See* 26 U.S.C. § 9012 (a); 2 U.S.C. § 441a(b). These provisions, which carry criminal sanctions, render section 9012(f) entirely superfluous to the Fund Act's purpose of relieving candidates from the burdens of fund-raising.

Section 9012(f) is an equally inept means of serving the other purpose of the public financing provisions—elimination of the candidate's reliance on large private contributors. The provision of more than $30 million in public funds coupled with the prohibition on expending sums in excess of that amount will accomplish this objective in future campaigns. Moreover, as the Supreme Court noted in *Buckley,* "[t]he interest in alleviating the corrupting influence of large contributions is served by the [Campaign] Act's contribution limitations and disclosure provisions . . ." 424 U.S. at 55. These limitations, upheld in *Buckley,* restrict contributions by individuals or groups to $1,000. Contributions by corporations or unions are prohibited by other provisions. *See* 2 U.S.C. § 441b.

Appellants assert that section 9012(f) can be upheld as a means of safeguarding against evasion of the Fund Act's prohibition on contributions to presidential candidates who accept federal funding. FEC Br. at 18-20; Common Cause Br. at 30-32. The exact same rationale was advanced in *Buckley* by the defenders of the limitation on independent expenditures imposed by section 608(e)(1). *See* 424 U.S. at 44. The Court's rejection of that rationale is equally applicable here: the "markedly greater burden on basic freedoms caused by §608(e)(1) ... cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations." *Id.* [11] Moreover, section 9012(f) is plainly not designed to prevent evasion of the contribution prohibition incorporated in the public financing provisions since section 9012(f) places no limit whatsoever on independent expenditures by individuals.

Finally, appellants claim that section 9012(f) promotes a third goal of public financing—the elimination of any private political expenditures in presidential election campaigns. FEC Br. at 12-18; Common Cause Br. at 32-34. This purported goal also provides no basis for upholding section 9012(f). First, section 9012(f) does not eliminate private political expenditures since it (1) permits unlimited expenditures by individuals, (2) authorizes groups to spend up to $1,000 each, (3) allows substantial sums to be spent by political parties, and (4) permits unlimited sums to be spent by the institutional

[11] This Court's recent decision in *California Medical Association v. Federal Election Commission, supra,* does not depart from this aspect of *Buckley.* Rather, like *Buckley,* it holds that certain *contribution* limitations that only indirectly and incidently restrict protected First Amendment activity (such as the $25,000 overall limitation on contributions by individuals upheld in *Buckley* and the $5,000 limit on contributions to multicandidate political committees upheld in *California Medical Association*) may be sustained on the basis of the governmental interest in preventing circumvention of other, more important contribution limitations. *See California Medical Association v. Federal Election Commission, supra,* slip op. at 14-15 (plurality opinion). The *California Medical Association* opinion reaffirms *Buckley*'s holding that independent political expenditures by groups (including large, statewide associations such as the 25,000 member California Medical Association) are "constitutionally protected." *Id.* at 12.

press. Second, and more fundamentally, this Court held in *Buckley* that such an objective contravenes basic First Amendment principles. As the Court emphasized, under "our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range" of political expression. 424 U.S. at 57. Thus, Congress may not seek to suppress independent group efforts to promote a candidate's political views or electoral prospects.

2. Elimination of Corruption and the Appearance of Corruption

In addition to attempting to justify section 9012(f) on the basis of the public financing scheme embodied in the Fund Act, appellants contend that section 9012(f) serves a compelling public interest by eliminating corruption and the appearance of corruption allegedly produced by large independent expenditures in support of presidential candidates. FEC Br. at 22; Common Cause Br. at 23-29.

This Court in *Buckley* recognized that the elimination of "the actuality and appearance of corruption" is an important governmental interest. 424 U.S. at 26-27. It sustained the $1,000 contribution limitation at issue in that case on the ground that the limitation "focuse[d] *precisely* on the problem of large campaign contributions" and did not "undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues." *Id.* at 28-29 (emphasis added).

The Court, however, found the interest in stemming the reality and appearance of corruption to be an inadequate basis for upholding the $1,000 limit on independent expenditures imposed by section 608(e)(1). Each reason given for this conclusion applies with equal force here. First, the ceiling on independent expenditures imposes a "markedly greater burden on basic freedoms" of speech and association than do contribution limitations. *Id.* at 44. Second, the expenditure ceiling limits independent advocacy but does not restrict direct gifts of large sums of money to candidates or sizable expenditures

made at the direction of or in coordination with the candidate —the conduct that presents the greatest threat of real and apparent corruption. *Id.* at 45-47. As a result, the independent expenditure ceiling focuses only on activities that pose a "substantially diminished potential for abuse." *Id.* at 47. Third, even assuming that independent expenditures present a significant risk of corruption, section 9012(f), like section 608(e)(1), does not provide a meaningful response to that threat because it could easily be circumvented by individuals and groups desiring to buy influence through large independent expenditures. *Id.* at 45.[12]

In addition, section 9012(f) has other glaring deficiencies as a device for safeguarding against the corruption of presidential candidates. Unlike section 608(e)(1), section 9012(f) permits unlimited expenditures by individuals. It, therefore, does nothing to avoid corruption due to large-scale independent advocacy by wealthy individuals. In addition, again unlike section 608(e)(1), section 9012(f) has no application to presidential primary campaigns and only applies in the general election to particular candidates who are eligible for and choose to accept federal financing.[13] The limited scope and conditional

[12] To avoid serious vagueness problems, this Court in *Buckley* construed section 608(e)(1) to apply only to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 44. In order to avoid the similar vagueness problems posed by section 9012(f)'s limitation on expenditures that "further the election" of a publicly-funded candidate, section 9012(f) also would have to be confined to expenditures that expressly advocate the election or defeat of clearly identified candidates. "The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines [section 9012(f)'s] effectiveness ... by facilitating circumvention by those seeking to exert improper influence upon a candidate or officeholder." *Buckley v. Valeo, supra,* 424 U.S. at 45.

[13] Section 9012(f) thus is even more susceptible to circumvention than section 608(e)(1). According to appellants, the primary problem addressed by section 9012(f) is the threat of corruption or the appearance of corruption presented by political professionals that head political committees and control their independent expenditures. Such seasoned professionals, of course, are well-equipped to skirt any restriction confined to express advocacy of the election or defeat of named candidates. *See* n.12, *supra.* Moreover, since

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nature of section 9012(f) suggest that the provision was not even intended by Congress as a means of stemming the reality or appearance of corruption but rather was designed to limit, to some extent, the private funds available to supplement publicly funded compaigns—a constitutionally impermissible goal. *See* p. 16, *supra*. It is apparent that section 9012(f) is extremely ill-suited to serve as a safeguard against corruption of presidential candidates and thus cannot be sustained as a means of checking corruption.[14]

II. NO LIMITING CONSTRUCTION CAN FAIRLY BE GIVEN TO SECTION 9012(f) TO SAVE ITS CONSTITUTIONALITY.

Recognizing that section 9012(f) cuts far too deeply into fundamental First Amendment freedoms to be upheld, appellants seek to place a limiting construction on the section. In essence, appellants suggest that section 9012(f) applies to well-funded, nationwide organizations employing sophisticated communications techniques, but not to an amorphous class of

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section 9012(f) does not apply to presidential primary campaigns, political professionals would be free to attempt to gain or appear to gain influence with candidates through expenditures of political committees made prior to the general election.

[14] Apart from the lack of a constitutionally sufficient justification, section 9012(f) must fall because it is impermissibly both under-inclusive and over-inclusive. Section 9012(f) is under-inclusive, and thus would be ineffective, because it does not apply to expenditures—no matter how large—made directly by individuals advocating a candidate's election. Moreover, it does not apply to internal communications by labor unions, corporations or membership organizations and does not limit sums expended by owners of media entities on news stories or editorials. *See* 2 U.S.C. §§ 431(8)(B)(vi), (9)(B)(i), (9)(B)(iii), 441b(b)(2)(A). At the same time, the section is sweepingly over-inclusive in addressing the purported threat posed by 1 professional "fundraisers" (Common Cause Br. at 26-29) because it applies to all groups, regardless of their structure or mode of operations. Groups that are run by political neophytes or by committees do not pose the supposed threat focused upon by appellants but still would be silenced by section 9012(f)'s expenditure ceiling.

smaller, less formal, less effective committees. This interpretative effort to save the constitutionality of section 9012(f) is fundamentally misconceived.

A. The Excessive Scope Of The Statutory Language Is Clear.

Common Cause asserts that section 9012(f) does not limit expenditures by "informal groups of persons acting together directly on their own behalf." Common Cause Amended Complaint, ¶ 2, Common Cause J.S. App. at 71a; *see* Common Cause Br. at 12, 35. Similarly, the Federal Election Commission—in direct contradiction of its own regulations—contends that the provision does not apply to "a group of individuals making expenditures to amplify their voices in support of a publicly financed candidate so long as the individual participants retain control over their funds." FEC Br. at 45 & n.66; *see* FEC J.S. at 19.[15] Nothing in the language of section 9012(f) supports the limiting construction advanced by appellants.

The broad definition of "political committee" in 26 U.S.C. § 9002(9) is all-encompassing: "*any* committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence" any federal, state or local election. This broad definition admits of no distinction between informal, close-knit associations and sophisticated, broad-based organizations. As the court below noted, this definition of political committee "is roughly the same as the definition of that term" in the Campaign Act—a definition that expressly encompasses any "group of persons." *See* Common Cause J.S. App. at 3a-4a n.2; 2 U.S.C. § 431(4)(A).

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[15] In acknowledging that the First Amendment does not permit restrictions on group expenditures when the individual members retain control over their own funds, the Federal Election Commission effectively concedes that the $5,000 contribution limitation in 2 U.S.C. § 441a(a)(1)(C)—the provision at issue in *California Medical Association v. Federal Election Commission, supra*—cannot be applied to bar the pooling of funds by individuals for independent group expenditures. This position was urged by the ACLU in its *amicus* brief submitted in the *California Medical Association* case, but the issue was not decided by the Court. *See* slip op. at 14 n.17.

The Federal Election Commission's own regulations recognize this sweep and require the rejection of the novel interpretation of "political committee" urged by appellants. Regulations adopted by the Commission in June 1980 state that the term "political committee," as employed in section 9012(f), reaches "*any* committee, club, association, or *other group of persons.*" *See* 11 C.F.R. §§ 100.5, 9002.9 (1981)(emphasis added). As the Commission explained at the time it promulgated these regulations, this definition is "in concert with the definition of political committee in Title 2 [the Campaign Act]." 45 Fed. Reg. 43371, 43372 (1980). In their efforts to persuade this Court to adopt a limiting construction of section 9012(f), appellants inexcusably omit any mention of the Commission's own regulations that explicitly define the coverage of the section in the broadest possible terms.[16]

In sum, the limiting construction proposed by appellants is without foundation in either the language or the administrative interpretation of the section.[17] This belated effort at wholesale redrafting cannot save section 9012(f).

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[16] Instead of informing this Court of its own controlling regulations, the Federal Election Commission strains to transform language in an irrelevant advisory opinion into support for its tortured reading of the provision. *See* FEC Br. at 45 n.66, *quoting* Advisory Opinion No. 126, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5577, at 10,713 (1980). That advisory opinion, which involves the "political committee" provision in the Campaign Act rather than the Fund Act provision, actually attempts to *expand* the scope of the definition by concluding that an individual who solicits funds from others for political purposes comes "within the definition of a political committee as 'any other group of persons.'"

[17] Contrary to the assertion of Common Cause (Common Cause Br. at 35 & n.60), the legislative history does not support the limiting construction urged by appellants. The House and Senate conference reports reveal that prior to conference the bills placed a $1,000 ceiling on *all* expenditures in support of a presidential candidate who accepted federal funding. S. Rep. No. 553, 92d Cong., 1st Sess. 57 (1971); H.R. Rep. No. 708, 92d Cong., 1st Sess. 57 (1971). The bills were amended in conference to eliminate the limitation on expenditures by individuals and to make clear that the limitation on organizations did not apply to broadcasting organizations, periodicals, or tax-exempt organizations reporting to their members. S. Rep. No. 553, *supra*, at 58; H.R. Rep. No. 708, *supra*, at 58. The conference reports do not contain any reference to or provide any support for an exception for organizations in which the individual members retain control over their funds. S. Rep. No. 553, *supra*, at 56-59; H.R. Rep. No. 708, *supra*, at 56-59.

B. The Definition Of "Political Committee" Proffered By Appellants Is Unconstitutionally Vague.

Even if section 9012(f) meant what appellants now assert it does, their interpretation would not save the constitutionality of the provision. The introduction of the fuzzy distinctions conjured by appellants would simply add to the other failings of the provision by rendering it unconstitutionally vague.

The Fifth Amendment requirement of due process leaves no room for vague or imprecise criminal laws. The imperatives of due process are even stronger where, as here, First Amendment interests are implicated. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). As the Court has emphasized, vague laws trap the innocent by failing to provide fair warning and operate to inhibit protected expression by inducing citizens to "steer far wider of the unlawful zone" than "if the boundaries of the forbidden areas were clearly marked." *Buckley v. Valeo, supra*, 424 U.S. at 41 n.48; *see, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

The limiting construction proposed by appellants would violate these well-established precepts. The only "standard" proffered by appellants—whether the individual participants in the group "retain control over their funds"—fails to provide a clear guide that persons working as part of a political organization could use to determine whether they are free to engage in unlimited expenditures for political expression or are in danger of being subjected to criminal sanctions under section 9012(f) for any expenditure in excess of $1,000. *See* FEC Br. at 45 n.66. Appellants' "standard" fails to specify where, on the continuum between a multi-million dollar media campaign funded by a nationwide committee with thousands of adherents and a political pamphlet drafted and funded jointly by a handful of like-minded neighbors, individual adherents yield enough "control" to others so that the group becomes subject to section 9012(f)'s criminal penalties.

The proposed construction of section 9012(f) would create a trap for the innocent and raise a serious danger of arbitrary application. It would also deter many organizations from participating in the political process.[18] Thus, the wholly amorphous, undefinable line between "informal groups" and "political committees" espoused by appellants lacks the precision and clarity required by both the First and Fifth Amendments.

C. Appellants' Limiting Construction Does Not Alleviate Section 9012(f)'s Impermissible Restriction Of Protected Political Expression.

Beyond these deficiencies, appellants' salvage effort rests on a fundamental misunderstanding of the First Amendment. It assumes—erroneously—that the First Amendment permits restrictions on independent political expression by associations when the restrictions are pegged to the effectiveness of the organization or the control of the organization's members over and the extent of their participation in shaping the content of the organization's political expression. Nothing could be more foreign to the First Amendment. *See* pp. 10-11 *supra.*

The free speech rights of individuals and groups alike extend to "vigorous" advocacy no less than to abstract political discussion. *Buckley v. Valeo, supra,* 424 U.S. at 48. The size of the group or its expenditures—and hence the strength of the group's voice—cannot provide a legitimate basis for regulation. As the district court pointedly observed: "Since it is beyond contention that individuals and 'informal groups' may make unlimited independent expenditures to express their First Amendment rights, political committees may not be denied the same right merely because they are *efficient* groupings of like-minded individuals." Common Cause J.S. App. at 16a (emphasis in the original). *Accord, Consolidated Edison Co. v. Public Service Commission, supra,* 447 U.S. at 533; *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 776-78.

[18] Contrary to the Federal Election Commissions's suggestion, FEC Br. at 20 n.21, the dangers of vague criminal laws are not alleviated by the normal culpability requirement that the violation be "knowing" and "willful."

Appellants' construction of section 9012(f) would deny First Amendment rights of free expression to all mass associations, since it would be impossible for all or even most of the supporters of such organizations jointly to draft its political communications or to review and comment on them before they are made. Section 9012(f), as construed by appellants, thus would prevent most organizations from "effectively amplifying the voice of their adherents"—"the original basis for the recognition of the First Amendment protection of the freedom of association." *Buckley v. Valeo, supra,* 424 U.S. at 22, *citing NAACP v. Alabama,* 357 U.S. 449, 460 (1958). Yet associations with numerous adherents have as much right as tiny, informal groups to engage in free political expression.[19]

In sum, the philosophical premise underlying appellants' limiting construction—that political expression can be regulated if it has mass support or promises to be sufficiently effective—rests on a misguided view of the First Amendment. What appellants evidently perceive as an abuse to be remedied is exactly what the First Amendment is intended to safeguard from government encroachment. This Court should firmly reject the novel theory of political free speech urged by appellants.[20]

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[18] Contrary to the Federal Election Commissions's suggestion, FEC Br. at 20 n.21, the dangers of vague criminal laws are not alleviated by the normal culpability requirement that the violation be "knowing" and "willful."

[19] Section 9012(f)'s limitation on the right of organizations to engage in political advocacy "is simultaneously an interference with the freedom of its adherents," *Sweezy v. New Hampshire.* 354 U.S. 234, 250 (1959) (plurality opinion), who often have no alternative means of participating effectively in the political process. *See* p. 8 *supra.*

[20] Contrary to Common Cause's assertion, there is no need for a remand for development of a more detailed record. Common Cause Br. at 41-44. As with the expenditure limitations found unconstitutional in *Buckley,* section 9012(f)'s drastic restraint on fundamental First Amendment freedoms is apparent from the language of the provision and requires that it be declared unconstitutional on its face.

CONCLUSION

For the reasons stated, the judgment of the district court declaring 26 U.S.C. § 9012(f) unconstitutional should be affirmed.

Respectfully submitted.

PHILIP A. LACOVARA
GERALD GOLDMAN
RONALD A. STERN

HUGHES HUBBARD & REED
Attorneys for Amicus Curiae
American Civil Liberties Union

Of Counsel:
CHARLES S. SIMS
ARTHUR EISENBERG
ARTHUR B. SPITZER

AMERICAN CIVIL LIBERTIES UNION

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Nos. 80-847 and 80-1067
(Consolidated)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-847

COMMON CAUSE, *et al.*,
Appellants,

v.

HARRISON SCHMITT, *et al.*,
Appellees.

and

No. 80-1067

FEDERAL ELECTION COMMISSION,
Appellant,

v.

AMERICANS FOR CHANGE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC., AMICUS CURIAE, IN SUPPORT OF APPELLEES

BEN B. BLACKBURN
WAYNE T. ELLIOTT*
ALLEN R. HIRONS
Attorneys for Southeastern Legal Foundation, Inc.
1800 Century Boulevard,
Suite 950, Atlanta, Georgia 30345
(404) 325-2255

Counsel of Record

July 8, 1981

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On Appeal from the United States District Court for the District of Columbia

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BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC., AMICUS CURIAE, IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

Through this brief Southeastern Legal Foundation, Inc. ("Southeastern"), supports the interests of citizens adversely affected by the restraints of 26 U.S.C. § 9012(f), Section 9012(f) of the Presidential Election Campaign Fund Act ("Fund Act"). That statute

interferes with the First Amendment rights of individuals who exercise their political freedoms in presidential campaigns by expressing themselves through the mechanism of independent political committees not controlled by candidates or their authorized committees, including official party committees.

A large body of citizens is actually and potentially restrained in their exercise of constitutional rights by Section 9012(f). Many individuals, including some of Southeastern's trustees, officers and contributors, participated in the 1980 presidential campaign and expressed themselves by supporting and making possible the activities of various independent political committees. According to the Gallup Poll, recent data, covering the period of October through December, 1980, indicates that thirty-one percent of citizens identify themselves as "independent", rather than as Democrat or Republican. *The Gallup Opinion Index*, 63-65 (No. 183, Dec. 1980). With such a high percentage of Americans identifying themselves as independents, the potential for continued and possibly increased independent political committee activity is significant.

In view of the broad impact of Section 9012(f), Southeastern has participated in this litigation by submitting amicus curiae briefs to the District Court and by urging this Court to note probable jurisdiction and to affirm. The parties have consented to the filing of this brief and copies of their consent letters have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

Protecting the freedom to communicate one's views in the political process of presidential elections is a key function of the First Amendment. To have meaningful impact in today's presidential contests, speech must be communicated through costly mass media. Although some wealthy individuals could afford to spread their views through such media, most citizens can achieve meaningful political speech only by associating with others. Many choose to associate for that purpose through independent political committees.

The limitation upon expenditures of independent political committees imposed by Section 9012(f) effectively deprives many citizens of the opportunity to express their political thoughts in a meaningful manner. This restraint has the consequence of giving greater weight to the views of wealthy citizens who are not limited by independent political committee restraints because they can afford to purchase the media exposure to widely disseminate their views.

By preventing effective association of individuals through independent political committees, Section 9012(f) unconstitutionally enhances the voices of some at the expense of others. It operates to burden core First Amendment rights of freedom of speech and freedom of association.

Substantial interference with constitutional liberties can only be justified by a compelling governmental interest through a statute narrowly tailored to achieve its purpose. Section 9012(f) does not satisfy these strict requirements. Consistent with past decisions,

this Court should affirm the opinion below and hold that Section 9012(f) violates the First Amendment.

ARGUMENT

SECTION 9012(f) OF THE FUND ACT VIOLATES THE FIRST AMENDMENT

Southeastern believes the District Court was correct in holding that Section 9012(f) of the Fund Act violates fundamental First Amendment rights of freedom of speech and freedom of association. The decision below is consistent with this Court's holding in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*"Buckley"*) and last year's decision in *Republican National Committee v. Federal Election Commission*, 487 F. Supp. 280 (S.D. N.Y.), *aff'd mem.*, 445 U.S. 955 (1980).

A. Independent Political Committees Are Denied Meaningful First Amendment Rights In Presidential Campaigns By Section 9012(f).

The $1,000 limitation upon expenditures by independent political committees contained in Section 9012(f)[1] operates as an effective bar to meaningful

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[1] Section 9012(f)(1) states, in relevant part, that:

> [I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidate, in an aggregate amount exceeding $1,000.

free expression by such committees in presidential campaigns. In light of an increasing dependence by the electorate upon the mass media for news and information, this Court has noted that "these expensive modes of communication [are] indispensable instruments of effective political speech." *Buckley, supra* at 19. Ruling unconstitutional a $1,000 limitation upon independent expenditures contained in former 18 U.S.C. § 608(e)(1), this Court held that the limitation appeared "to exclude all citizens and groups, except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication." *Id.* (footnotes omitted).

Five years have passed since that decision and $1,000 buys considerably less now than it did in 1976. If this Court continues to hold, as Southeastern believes it should, that use of expensive mass media such as television, radio, and newspapers is a prerequisite to meaningful political speech by individuals and groups, Section 9012(f)'s $1,000 limitation upon expenditures by independent political committees should be regarded as depriving those committes of "the type of speech indispensable to decisionmaking in a democracy . . .." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

B. Section 9012(f)'s Restraints Upon Independent Political Committees Operate To Deny Many Citizens Meaningful First Amendment Rights.

In order to justify Section 9012(f)'s burdens upon First Amendment rights, appellants Common Cause and Federal Election Commission ("F.E.C.") argue

that Section 9012(f) does not prevent individuals and informal groups of individuals from engaging in unrestricted free speech on behalf of presidential candidates. To fully understand the impact of Section 9012 (f), one must go beyond the literal language of the statute, the spot where appellants have stopped, and examine how it works in the real world.

Section 9012(f) applies its sanctions upon "political committees". According to 26 U.S.C. § 9002(9), a political committee is

> any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State or local elected office.

Since this language does not include individuals, appellants assert that "individuals (and groups of individuals acting jointly) [are] free to make unlimited independent expenditures in Presidential campaigns." Common Cause Brief, 38. See F.E.C. Brief, 42, 45-46.

While individuals and perhaps certain groups[2] do

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[2] Both appellants assume that "informal" groups of individuals are not covered by the statutory definition of "political committee." See, F.E.C. Brief, 45-46; Common Cause Brief, 35, 38. However, the language of 26 U.S.C. § 9002(9), "any committee, association, or organization (whether or not incorporated) . . .," read literally would cover all groups or entities consisting of more than one individual. If Section 9012 (f) does exclude certain groups from its coverage, that is not clear from either Section 9012(f) or 26 U.S.C. § 9002(9). The

retain the freedom to make unrestricted expenditures, not all individuals and groups are in a position to take advantage of this unrestrained freedom of speech. The great costs involved with meaningful speech permit only the most wealthy individuals to take advantage of their freedom to express themselves effectively in presidential campaigns.

Inexplicably blind to the economic realities facing most citizens, appellants speak as though the unrestricted individual option is readily exercisable by all persons. Common Cause states that "*everyone* can find numerous ways to support publicly financed candidates consistently with Section 9012(f). For example, individuals (acting either singly or jointly) can purchase advertisements in local newspapers . . . [and] can purchase local billboard space . . .." Common Cause Brief, 40 (emphasis added). In this context, Common Cause comments that individuals can "purchase advertisements in more expensive, nationally circulated newspapers, since the Fund act imposes no ceiling on independent expenditures by individuals." *Id.*, n. 66. How *everyone*, rich, poor and middle income can en-

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legislative history pointed to by Common Cause, see Common Cause Brief, 35-36, is of no help in further defining the scope of Section 9012(f). The unclear range of Section 9012(f)'s coverage invites unwitting violation of its prohibition by the innocent who are not provided fair warning. *See*, Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). Particularly here, where First Amendment freedoms are affected, more specificity in the statute should be required. *See*, N.A.A.C.P. v. Button, 371 U.S. 415, 433, 438 (1963). Southeastern believes there is ample basis for invalidating Section 9012(f) because it is vague as to which groups it covers and which it does not. *See*, Lanzetta v. State of New Jersey, 306 U.S. 451 (1939).

gage in this free speech is not explained.

F.E.C. is likewise insensitive to the implications of its own arguments. In a criticism of appellee independent political committees, F.E.C. says that they "are clearly not like a *wealthy* individual or like groups of individuals who retain control over the spending of their own funds to support candidates." F.E.C. Brief, 45 (emphasis added).

In fact, most individuals do not have the financial ability to exercise their freedom in the manner contemplated by appellants. The only way most citizens can obtain effective political speech in presidential elections is to associate with citizens of similar economic means in order to pool the resources necessary to purchase costly media.

Both appellants insist that "informal" groups must involve citizens retaining "control" over the groups' funds without any relinquishment of "control" to some decision-maker. F.E.C. Brief, 45-46; Common Cause Brief, 36. This approach may work for a few wealthy individuals, but is totally impractical for larger groups. Although it might be feasible for five millionaires to travel together to a television station in order to buy $50,000 worth of advertising with cash out of their own pockets, 500 persons able to put up only $100 each could not achieve that feat. An organization involving delegated authority would be necessary for them to make similar purchases. While such an organization may not permit each supporting individual to retain direct control over every detail and decision of the group, surely the necessity of sharing responsibility, which arises out of the financial limita-

tions of the individuals involved, should not be a reason for denying the group as a whole the opportunity of exercising effective free speech. To subject a group to the restrictions of Section 9012(f) because it does not function like the model appellants have described has no basis in the statute itself, and would penalize individuals for not being wealthy enough to exercise the sort of joint control appellants demand.

Given the economic reality which makes independent political committees necessary for many individuals who wish to have effective political speech, and given the unavailability of informal group activity within the boundaries set by appellants, Section 9012(f) must be considered to restrain individual rights as surely as it restricts independent political committee rights.

This view is consistent with conclusions already reached by this Court. In *Buckley*, this Court invalidated a provision of the Federal Election Campaign Act[3] which limited independent expenditures to $1,000 "relative to a clearly identified candidate" in federal campaigns, saying that it "precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First

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[3] The section in question, former 18 U.S.C. § 608(e)(1), provided that:

> No person may make any expenditure (other than an expenditure made by or on behalf of a candidate within the meaning of subsection (e)(2)(B)) relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the calendar year advocating the election or defeat of such candidate, exceeds $1,000.

Amendment protection of the freedom of association." *Buckley, supra,* at 22. In this context, "constraints on the ability of independent associations . . . to expend resources on political expression 'is simultaneously an interference with the freedom of [their] adherents,' *Sweezy v. New Hampshire,* 354 U.S. 234, 250 . . . (1957) (plurality opinion)." *Id.*

Without the option of unrestricted independent expenditures, many individuals and groups would be denied the opportunity to "effectively amplify" their political views in presidential campaigns. To this extent they would be at a disadvantage as compared to the small number of citizens who could afford to "effectively amplify" their views. Such a disadvantage would be constitutionally impermissible. "The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Buckley, supra* at 49. Congress may not "restrict the speech of some elements in our society in order to enhance the relative voice of others." *Id.* at 48-49. Yet, that is the effect of Section 9012(f) and it therefore deprives most citizens of the option of meaningful speech through unrestricted individual activity.

Appellants also assert that ample First Amendment opportunities are provided by the various candidate-related and party-related options allowed by federal law. Both F.E.C. and Common Cause point out that individuals may contribute their volunteer services to their chosen candidates or to the parties supporting those candidates. F.E.C. Brief, 43; Common Cause Brief, 39. Similarly, individuals may contribute finan-

cially to the national, state and local party committees which engage in activities in support of the presidential candidates. Common Cause Brief, 40; F.E.C. Brief, 44.[4]

Persons who identify with the political parties and who agree to associate themselves with the campaign structures operated by the candidates can certainly enjoy these party/candidate controlled avenues of expression. However, those individuals who do not wish

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[4] Appellants' discussion of citizen contributions to political parties leaves the impression that such contributions automatically will be used to support the presidential candidates favored by the contributor. Thus, Common Cause states, first, that "all persons [are] free to help a publicly financed candidate by contributing money to his party's national committee, which may *in turn* spend up to a specified limit . . . to promote the party's national ticket . . .," and second, that "[e]very individual can also help a publicly financed candidate by contributing money to his party's state and local committees which may *in turn* use as much of their money as they wish to support the candidate . . .." Common Cause Brief, 40 (emphasis added). See F.E.C. Brief, 44.

Neither appellant mentions that 2 U.S.C. § 431(9)(B)(viii) prohibits state and local party committees from making expenditures with money contributed by donors who designate that the contribution be spent for a particular candidate. According to 11 C.F.R. § 100.8(b)(16)(iii), a contribution is not considered as "designated, if the party committee disbursing the funds makes the final decision regarding which candidate(s) shall receive the benefit of such disbursement."

It is ironic that appellants point approvingly to a scheme by which individuals must surrender ultimate control over the disbursement of their contributions to political party, and yet argue that individuals are not free to associate together, using delegated authority in order to make independent expenditures, without falling subject to Section 9012(f)'s limitations.

to be affiliated with the existing parties or authorized committees cannot conscientiously use these methods for self-expression. The large numbers of persons so affected is indicated by the high number of independent voters in the nation.

Even service in a preferred candidate's campaign may not be an acceptable option for an "independent." Such a voter may not wish to associate with a campaign and thereby possibly be identified with a particular party. Or he may not choose to restrict his support to the particular strategy and program of the candidate-controlled campaign. Moreover, he may even wish to take positions and express himself in a manner not particularly to the liking of the candidate. Obviously an independent route of expression is necessary for such individuals.

Although an individual may wish to engage in volunteer activities, personal limitations may make campaign involvement impossible. Persons who work long hours or have health problems or other limiting characteristics cannot reasonably be expected to serve as party workers or fulfill active campaign obligations.

In sum, personal participation in and financial support of candidate and party-controlled political committees do not provide reasonable alternatives to many citizens. In any event, whether or not a voter chooses to avail himself of such options, they still do not provide the opportunity of achieving the meaningful impact of electronic and print mass media and cannot be regarded as meaningful substitutes.

Southeastern submits that this Court's holding in

Buckley, that the First Amendment prohibits limitations upon independent expenditures, is as correct today as it was in 1976. In their pursuit of meaningful free speech, both individuals and the independent political committees they support should be protected from any congressional attempts to limit political debate in presidential campaigns in a manner which favors certain citizens to the detriment of others.[5]

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[5] This Court's consideration of Section 9012(f) comes at a time when the major parties have declared themselves against independent political committee exepnditures and may support even more restrictions on them. Mr. Richard Richards, Chairman of the Republican National Committee has described the system of independent expenditures as "fraught with mischief" and has called for further controls upon it. N.Y. Times, April 26, 1981, § 1, at 22. Mr. Charles Manatt, Democratic National Chairman, has appointed a task force "to investigate the impact of these groups that answer to nobody and have a great evil influence on our society." Wash. Post, May 6, 1981, at A6.

If this Court upholds Section 9012(f), and even further controls upon independent political expression are enacted, free and effective debate in presidential campaigns will be left to only the candidates, their parties and the news media. Southeastern does not believe such a siutation would be consistent with the Constitution's guarantee of freedom of speech for citizens in the political process. This Court has already recognized that " 'a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.' " First National Bank of Boston v. Bellotti, 435 U.S. 765, 776-77 (1978). Limitations on independent political committees and their supporting citizens undermine such free discussion.

C. The Burdens Placed Upon The Constitutional Right Of Free Expression By Section 9012(f) Are Not Justified By A Compelling Governmental Interest In Eliminating Corruption From The Electoral Process.

Inasmuch as Section 9012(f) significantly interferes with the exercise of the freedoms of speech and association by individuals and independent political committees, the statute can survive only if justified by a compelling governmental interest. The constitutionality of Section 9012(f) "turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley, supra* at 44.

Common Cause and F.E.C. argue that Section 9012 (f) is justified because it is consonant with the governmental interests associated with the establishment of the Fund Act. The primary thrust of this justification is that the limitation upon independent expenditures serves to eliminate corrupting influences from the presidential election process. F.E.C. argues that "Congress designed the Fund Act to eliminate the appearance and possibility of political *quid pro quos* prevalent in privately financed presidential campaigns and to foster individual participation and public discussion in the electoral process." F.E.C. Brief, 8-9. Similarly, Common Cause asserts that "[o]nly Section 9012(f) is available to meet the threat that a publicly financed candidate, wittingly or unwittingly, will be put under heavy obligation to the managers of political committees who raise and spend millions of additional

dollars to help him get elected." Common Cause Brief, 23.

Running through the position taken by both appellants is the notion that independent political committee expenditures somehow evade or circumvent the intention of Congress to prohibit contributions to publicly funded candidates and thereby raise the possibility of an impermissible corrupting influence. This theme is evident when F.E.C. says that Section 9012(f) "assures that federal funds received by presidential candidates are not a mere supplement to private financing," F.E.C. Brief, 10, and where Common Cause asserts that Section 9012(f) "prevents evasion of the Fund Act's ban on private contributions to . . . publicly financed presidential candidates." Common Cause Brief, 30.

Common Cause and F.E.C. unreasonably assume that independent political committees cannot, in fact, function independently of presidential candidates, and that they necessarily function in coordination with presidential candidates. By alleging vague connections between specific "independent" political committees and presidential candidates as sufficient to show corrupting influence and links, appellants ignore the holding of this Court as to the distinction between independent and non-independent expenditures. In *Buckley, supra* at 46-47, while striking down a statute similar to Section 9012(f) in its effect, this Court wrote that there is a distinction between "expenditures controlled by or coordinated with the candidate and his campaign," and those "expenditures made totally independently of the candidate and his campaign." This Court

found that the former type of expenditures should be "treated as contributions" under the Federal Election Campaign Act of 1971.[6] The latter type of expenditures are consequently to be treated as "independent" and should not be thought of as having the potential for corruption.

The defect of appellants' theory and likewise the defect of Section 9012(f) is that they cover the activities of *all* "independent" political committees, whether or not a particular group is genuinely independent of a candidate. Since Section 9012(f) applies to all expenditures in excess of $1,000 furthering the election of presidential candidates, without regard to the true character of the expenditures, it catches in its net both the good and the bad fish.

Contrary to the characterization of Section 9012(f) urged by appellants, the statute is *not* narrowly tailored to achieve a compelling governmental interest. As with the statute in *Buckley*, Section 9012(f) includes restrictions upon expenditures which "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Buckley, supra* at 47. Such expenditures, lacking direct contact with or influence from a candidate, "undermine . . . the value of the expenditure[s] to the candidate, but also alleviate . . . the danger that expenditures will be

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[6] Southeastern agrees with the District Court that expenditures which are in reality contributions to a candidate should be treated as such and can be dealt with by the F.E.C. through its enforcement powers. Opinion of District Court, Common Cause's Jurisdictional Statement at 13a, 25a.

given as a *quid pro quo* for improper commitments from the candidate." *Buckley, supra* at 47.

Through its overly broad coverage of independent political committee expenditures, Section 9012(f) fails, as did the statute in *Buckley*, "to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process . . . [and] it heavily burdens core First Amendment expression." *Id.* at 47-48. Even though Congress may properly seek to eliminate corruption in the electoral process, it must do so only through means which impose the least burden upon constitutionally protected liberties. Congress has simply gone too far in pursuit of its goal by enacting a law which restricts liberties and activities unnecessary to the achievement of that goal.

Without a substantial governmental interest to counterbalance the drastic restrictions Section 9012(f) places upon the exercise of free speech and free association by independent political committees and the individuals who support them, Section 9012(f) is unconstitutional.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the District Court below, holding that 26 U.S.C. § 9012(f) violates the First Amendment to the Constitution of the United States.

Respectfully submitted,

BEN B. BLACKBURN
WAYNE T. ELLIOTT*
ALLEN R. HIRONS

Attorneys for Southeastern Legal Foundation, Amicus Curiae

**Counsel of Record*

1800 Century Boulevard, N.E.
Suite 950
Atlanta, Georgia 30345
(404) 325-2255